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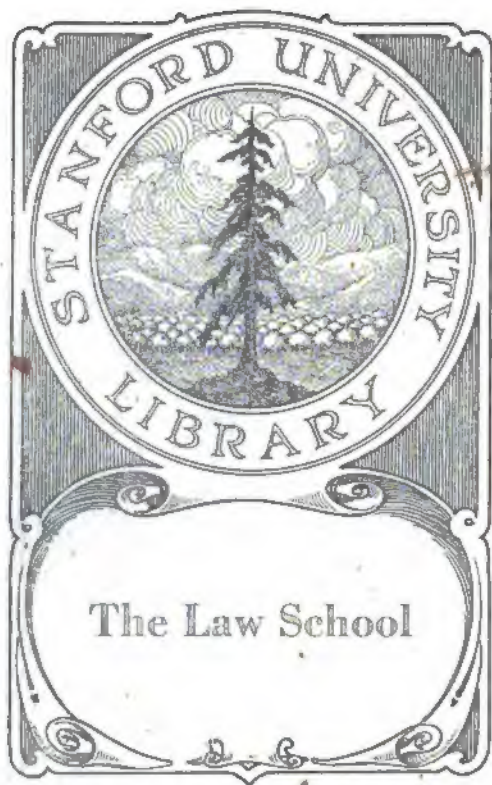
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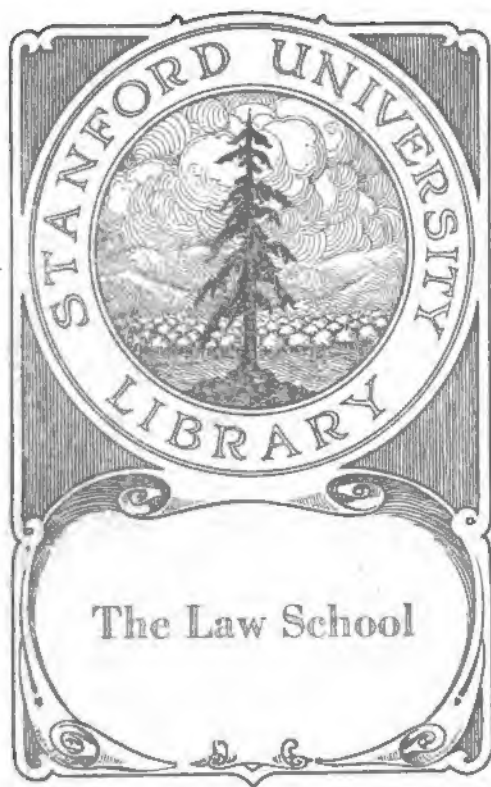
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**THE
NATIONAL
BANKRUPTCY REGISTER
REPORTS.**

**CONTAINING ALL THE
IMPORTANT BANKRUPTCY DECISIONS**

**IN THE
UNITED STATES.**

**WILLARD S. GIBBONS,
EDITOR.**

VOLUME XVI.

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THE NATIONAL
BANKRUPTCY REGISTER
REPORTS.

VOLUME XVI.

NEW YORK SUPREME COURT—THIRD DEPARTMENT.

JANUARY, 1877.

A debtor who has been discharged in bankruptcy may waive the discharge and allow a judgment to be recovered against him for the original debt.

Where the debtor has waived his discharge as a defense, it cannot be raised by one who is in possession of property of the debtor, transferred with intent to defraud creditors, in an action to set aside such transfer.

The assignee is but a trustee for the creditors; while he holds the property a creditor may bring an action to set aside a transfer by the bankrupt as fraudulent, if he makes the assignee a party; if not, the defendant must set this up as a defect of parties.

Upon the discharge of the assignee the property remaining in his hands reverts to the debtor without reassignment.

JAMES E. DEWEY et al., Respondents, v. HENRY MOYER and BETSEY MOYER, impleaded, etc., Appellants.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

This action was brought by the plaintiffs as judgment creditors of the defendant Clinton Eldredge, for the purpose of collecting their respective judgments, recovered in 1870, upon prior judgments recovered in 1856, out of property alleged to have been fraudulently transferred by the judgment debtor to the defendants Moyer, in 1858. The defendant El-

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dredge did not appear. The defendant Moyer set up as a defense to the action, first, a general denial, and second, "that on or about the 17th day of August, 1858, at Buffalo, in the State of New York, the United States District Court, held in and for the northern district of the State of New York, duly made an order and a decree discharging the defendant Clinton Eldredge of and from all his debts, of all of which proceedings in the said court in bankruptcy for such discharge the said plaintiffs and their said assignors, and each of them, had due notice; that the pretended indebtedness, if any such existed, or ever did accrue, accrued prior to the filing of the petition of the said Clinton Eldredge for his discharge from such debts in the said United States District Court, and prior to the granting of such discharge. * * * And the said defendant further answering said complaint, upon her information and belief alleges and avers that the said claims upon which the said pretended judgments, Nos, 4, 5, 6, 7, 8 and 9, as stated in said complaint, are based, were not valid, legal, subsisting claims against the said defendant, Clinton Eldredge, at the time the said judgments were obtained and recovered against him, by the said plaintiffs, as alleged in said complaint, if any such there are, by reason of lapse of time, and by reason of his said discharge from all his debts in the said United States District Court, but that the said judgments, if any exist, are fictitious, invalid and fraudulent, and were obtained by a fraudulent collusion, understanding, agreement and promise, made between said plaintiffs, or some of them, or their attorneys, or some of them, and the said defendant, Clinton Eldredge, that the same should not be enforced against him, nor should any portion thereof be collected from him, or out of his property or effects, but that the same should be only chargeable or attempted to be collected of and from the defendants Moyer, or either of them, for the joint and mutual benefit of the said plaintiffs and the said defendant, Clinton Eldredge. Wherefore, defendant asks that plaintiffs' complaint be dismissed with costs."

The referee found that the conveyance made by the defendant Eldredge to the defendants Moyer, in 1858, was made

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with intent to defraud his creditors, and upon the agreement that they should hold the farm for his benefit, and that they would restore it to him, after deducting the amount of their liens then existing thereon, and as conclusions of law:

First. That the defendant Eldredge having waived his discharge in bankruptcy, such discharge is, under the pleadings in this action, unavailable to the other defendants as a defense, and neither it nor the assignment connected therewith, furnishes any bar to the plaintiffs' right of recovery in this action.

Second. That, under the pleading and proofs, the plaintiffs have a perfect right to maintain this action, and are entitled to judgment therein.

Matthew Hale, for the appellants. The referee erred in not holding that the proceedings in bankruptcy and the assignment, and debtor's discharge therein, were a bar to the plaintiffs' right of recovery. All the property of the bankrupt vested in the assignee under and by virtue of the appointment of the assignee. (Bankrupt Law of 1867, Sec. 14; *Jones v. Milbank*, 6 Lans., 73.) No one but the assignee, since his appointment, has had a right to maintain an action to set aside a fraudulent conveyance. (*Goodwin v. Sharkey*, 5 Abb. [N. S.], 64; *Stewart v. Isidor*, id., 68; *In re Meyers*, 1 N. B. R., 581; *Thomas v. Phillips*, 9 Penn. St., 355; *Pomroy v. Lyman*, 10 Allen, 468; *Williams v. Merritt*, 103 Mass., 184.) The discharge granted to Clinton Eldredge was from all his debts, except those specifically excepted by the act. (Bankrupt Law, Sec. 32; and as to effect of discharge, see id., Sec. 34.) And the debts were discharged, although the judgment was rendered after the filing of the petition. (*Monroe v. Upton*, 50 N. Y., 593.) After the judgment debtor is discharged in bankruptcy, a creditor cannot proceed against his fraudulent transferee. (*Botts v. Patton*, 10 B. Mon., 452; *Ocean Bank v. Olcott*, 46 N. Y., 12.) The confessions of judgment to plaintiffs by the bankrupt, subsequent to the discharge, do not aid the plaintiffs. They amount simply to a new promise

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and create a new debt, enforceable only against newly acquired property of the bankrupt. (*Depuy v. Swart*, 3 Wend., 135, 139; *Baker v. Wheaton*, 5 Mass., 509, 512; *Lynbuy v. Weightman*, 5 Esp., 198; *Roberts v. Morgan*, 2 id., 736; *Stearns v. Tappin*, 5 Duer, 294, 299; *Carson v. Osborne*, 10 B. Mon., 155.) That assignee could maintain suit after and without vacating the discharge, as against a fraudulent grantee, see *Re Dole* (7 N. B. R., 538). The proceedings in bankruptcy were sufficiently pleaded. (Code, Sec. 161.) A fact necessarily understood or implied forms a part of a pleading as much as if specifically alleged, and a direct allegation of such fact, although proper, is never necessary. (*Partridge v. Badger*, 25 Barb., 146, 170; *Hunt v. Bennett*, 19 N. Y., 173; 2 Wait's Prac., 315, and cases there cited.) It is unnecessary to state, in pleading, matter of which the court takes judicial notice. (*Swinerton v. Ins. Co.*, 37 N. Y., 174; *People v. Snyder*, 41 id., 397; *Shaw v. Tobias*, 3 Comst., 188, 190.) And the court will take judicial notice of the public statutes of the United States. (*Jack v. Martin*, 12 Wend., 311, 329; *Platt v. Crawford*, 8 Abb. [N. S.], 297, 304.) The proof showing that the plaintiffs had no title or interest in the property sought to be reached, at the time this action was commenced, their complaint should have been dismissed. It was not necessary to take the objection before the trial. (*Mosselman v. Caen*, 10 N. B. R., 513, 1 Hun, 647; *Davis v. The Mayor, etc.*, 4 Kern., 506, 526; *Greene v. Breck*, 10 Abb., 42; *De Witt v. Chandler*, 11 id., 459.)

J. E. Dewey, for the respondent. The discharge was a personal defense for Eldredge only, a personal privilege, which he alone could set up or waive as he chose, like the defense of infancy, which is personal, and none but the infant can avail himself of it. (*Slocum v. Hooker*, 13 Barb., 536; *Parker v. Baker*, Clarke's Ch., 136-138; *Mason v. Denison*, 15 Wend., 64.) Bankruptcy and infancy are, in this country, put upon the same ground as a personal privilege. (*Slocum v. Hooker*, *supra*; *Blanchard v. Caswell*, 7 Gray, 153-155.) So that of

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the statute of limitations. (*Ravols v. The Am. M. L. Ins. Co.*, 27 N. Y., 282, 296; *Hyde v. Van Valkenburgh*, 1 Daly, 416.) Also, duress and usury, or any other technical or statutory defense. (*Boughton v. Smith*, 26 Barb., 635; *Murray v. Judson*, 5 Seld., 73, 83-85; *Furr v. Pymmer*, 2 Ch. Sent., 20; *Parker v. Rochester*, 4 Johns. Ch., 329, 331-333.) So the claim of exemption is personal. (*Earl v. Camp*, 16 Wend., 562.) So, though a party may, when sued, defend, he is not bound to for the benefit of others, either by insisting upon the statute of frauds (*Cahill v. Bigelow*, 18 Pick., 369, 372) or upon lapse of time. (*McCartney v. Welch*, 51 N. Y., 626, 627; *Adams v. Curtis*, reviewed, 10 Alb. L. J., 274; S. C., 4 Lans., 164, 169, HOGBOOM, J.) So, if the judgment is irregular, *he* only can take the objection. (5 Seld., 73, 84.) A bankrupt discharge is waived, and in this case was *waived* by the debtor's not pleading it or defending the suit. (*Price v. Peters*, 15 Abb., 197; *Medbury v. Swan*, 8 N. B. R., 537, 46 N. Y., 200; *Rudge v. Rundle*, 1 T. & Cook, 649, 651.) Even the mere delay or laches of the debtor waives it. (46 N. Y., 200; 3 T. & Cook, 118; S. C., 756; *Barstow v. Hansen*, 2 Hun, 333.) But a conclusive waiver of the discharge as to everybody was the bankrupt's confession thereafter of these judgments to the plaintiffs. (*Dusenbury v. Hoyt*, 10 N. B. R., 313, 53 N. Y., 521; *Stewart v. Wilson*, 2 Law and Eq. R., 234, 235.) Like the statute of limitations, a bankrupt discharge never paid or satisfied a debt. (*Johnson v. A. and S. R. R. Co.*, 54 N. Y., 416, 426, 427.) Pleading the discharge only was not an averment of an assignment or of an assignee's appointment. (*Sutherland v. Davis*, 10 N. B. R., 424.) It was necessary to aver the transfer directly, without leaving it to inference, conjecture or presumption. (*Pattison v. Taylor*, 8 Barb., 250; *Fisher v. Mayor, etc.*, 3 Hun, 648; 3 Den., 314; 6 Seld., 170; 29 Barb., 435, 442.) The making of the assignment was in no sense a *judgment* or *determination* of any court, and these defendants were, therefore, thrown back to the common-law rule requiring an averment of all the facts necessary to give jurisdiction. (Bankrupt Act, Sections 11 and

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14; Sto. Eq. Pl., Sec. 726, p. 562 [1st ed.]; *Carleton v. Leighton*, 3 Meriv., 667; Beames Eq. Pl., 120-122; Cooper Eq. Pl., 249, 250.) This objection now made amounts only to this: that the debtor's assignee had the right, as between him and the plaintiffs, as a trustee, to collect and distribute it to them, and possibly to other creditors, not parties, and who may not get their share. It is, therefore, only an objection, for a defect or want of parties, plaintiff or defendant, which, under the Code, was *waived* by not taking it by answer. (Code, Sections 144, 147, 148; *Fort Stanwix Bk. v. Leggett*, 51 N. Y., 552, 554, 555; *Fox v. Moyer*, 54 id., 125, 130; *Merritt v. Walsh*, 32 id., 685; *Zabriskie v. Smith*, 3 Kern., 322, 336; *Child v. Brace*, 4 Pai., 309; *Depuy v. Strong*, 3 Keyes, 603-605.) The rights of the bankrupt assignees "are not to be taken into consideration, unless they have themselves interfered." (*Drayton v. Dale*, 2 B. & Cress., 293, 295, 297; *Fort Stanwix Bk. v. Leggett*, *supra*; *Card v. Walbridge*, *supra*; *Freeman v. Denning*, *supra*; *Seaman v. Stoughton*, 3 Barb. Ch., 344; *Eyster v. Gaff*, 13 N. B. R., 546; 13 Alb. L. J., 144, 145.) This is so, even where their rights are claimed either *by* or *against* the bankrupt in a suit to which *he* is a party. (See same cases; also *Sanford v. Sanford*, 12 N. B. R., 565, 58 N. Y., 67; *Silk v. Osborn*, 1 Esp., 140; *Evans v. Brown*, id., 170; *Fowler v. Down*, 1 B. & P., 44, 48, 49; *Bird v. Pierpoint*, 1 Johns., 118.) And certainly the fraudulent holder has less rights or none at all. The Moyers could not have set up an outstanding title in another without connecting themselves with it. (16 Wend., 562, 571; 11 id., 54, 57; 4 Duer, 438; 16 Barb., 595-597; 16 How. Pr., 547.) Especially so, as against these plaintiffs, whose rights are better than, and prior to those, of fraudulent holders. (4 Johns. Ch., 687.)

LEARNED, P. J.—This action is brought by judgment creditors of Clinton Eldredge to declare certain other judgments in favor of the defendant Betsey Moyer to be fraudulent and void, on the ground that they were intended to defraud creditors; and also to reach property in the hands of the Moyers,

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alleged to be fraudulently held by them, as against the creditors of said Eldredge. The plaintiffs set up several judgments against Eldredge, recovered in June, September and October, 1870. The causes of action, on which they were recovered, are alleged to have arisen at certain times, prior to June, 1858.

The defendants Moyer, after denying the fraud, aver that on the 17th day of August, 1868, Eldredge was discharged by the United States District Court in bankruptcy from his said indebtedness to the plaintiffs; that their debts were provable in the bankruptcy proceedings, and that the plaintiffs are therefore barred from enforcing the same. On the trial the referee reported in favor of the plaintiffs, and the defendants Moyer appeal.

They insist, now, first: That the debts owing to the plaintiffs were discharged by the proceedings in bankruptcy. However that may have been, it was for Eldredge to insist upon that discharge when the judgments were taken against him in 1870. If he chose to waive his discharge, he was at liberty to do so. And if he did waive his discharge, or confess judgment, the defendants Moyer cannot dispute the validity of the judgments. (*Price v. Peters*, 15 Abb., 197; *Rudge v. Rundle*, 1 N. Y. S. C. [T. & C.], 649; *Medbury v. Swan*, 8 N. B. R., 537, 46 N. Y., 200.) It is not dishonest for a debtor, who has been discharged in bankruptcy, to waive the discharge and allow a judgment to be recovered against him for the original debt. (*Dusenbury v. Hoyt*, 10 N. B. R., 313, 53 N. Y., 521.) And if he permits a judgment to be thus recovered against him, the creditor has a right to enforce the judgment against any property of the debtor. One who is in possession of property of the debtor, transferred with intent to defraud creditors, cannot defend himself on the ground that the debtor might have had a defense against the judgment, if he had chosen to assert it.

But the second point, and one which is more strongly urged by the defendants Moyer, is that, after the appointment of an assignee in bankruptcy, he only can bring actions to set aside

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fraudulent transfers. (*Goodwin v. Sharkey*, 5 Abb. [N. S.], 64; Rev. Stat. U. S., Section 5046.)

The defendants urge, in support of this point, the case of *Ocean Nat. Bank v. Olcott* (46 N. Y., 12). But the difference between this case and that, is that the debt of the plaintiffs, in that case, had been discharged, and they were no longer creditors. Hence, it was held that they could not avail themselves of the benefit of 1 Revised Statutes (m. p.), 728, Section 52. But in the present case the plaintiffs *are* creditors, and the debts which they now hold have *not been discharged*. And the question is whether persons, who fraudulently took, and still hold, property of the debtor, shall be allowed to retain it, as against these creditors.

The defendants further insist that the present judgments create only a *new* debt, and can only be enforced against newly acquired property of Eldredge. But if this were so, it cannot be urged that a debt can only be enforced against property of the debtor *thereafter* acquired. Furthermore the complaint charged, and the referee finds that the fraudulent transfer was on a promise to restore the property to Eldredge, the debtor. Such a fraudulent transfer is void against even subsequent creditors. (2 R. S. [m. p.], 135, Sec. 1.)

In reply to this second point of the defendants, the plaintiffs say that, if this were any defense, it was only a defect of parties, not set up in the answer, and therefore waived. (Code, Sections 144, 147, 148.) It is not set up in the answer. The answer only alleges the discharge of the debt, and rests (aside from denial of the fraud) on the allegation that the debt is discharged. It does not aver that an assignee was appointed or that he should be a party to the action.

In the course of the trial copies of the proceedings in bankruptcy were offered in evidence, and objection was taken to their admissibility. They were admitted, and they contain a certified copy of the assignment, made by the register in bankruptcy to the assignee (under Rev. Stat. U. S., Sec. 5044). Now we pass to the question, which is urged by the plaintiff, whether this is proper evidence of the execution of the assign-

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ment. The proceedings were pertinent to the issue of discharge, and this copy assignment was a part of these proceedings. The reception of these proceedings in evidence was not a waiver (especially when objection was made) of the objection to the consideration of the issue of defect of parties. (*Williams v. M. and T. F. Ins. Co.*, 54 N. Y., 577; *Codd v. Rathbone*, 19 N. Y., 37.) The defendants set up Eldredge's discharge. The papers given in evidence were admissible to prove that. They did not set up that there was an assignee, and that the right of action was in him only, and therefore the proof (if there was proof) of the appointment of an assignee, coming in under the other issue, does not raise an issue which the defendants did not raise by their pleadings. A defense not pleaded is of no avail. (*Kelsey v. Western*, 2 N. Y., 500; *Brazill v. Isham*, 12 id., 9.)

An assignee in bankruptcy is but a trustee for the creditors, and does not hold the property as of his own right. When he makes a final dividend and renders his account, and it is passed, he is to be discharged from any liability to any creditor. (Rev. Stat. U. S., Sec. 5096.) On his discharge the property reverts to the debtor without a reassignment. (*Colie v. Jamison*, 13 N. B. R., 1, 4 Hun, 284.)

While he holds the property the creditors are *cestuis que trust*, and a *cestuis que trust* may bring an action such as this, if he makes the trustee a party. (*Fort Stanwix Bank v. Leggett*, 51 N. Y., 552; *Fox v. Moyer*, 54 id., 125.) And if he did not make the trustee a party, the defendant must set this up as a defect of parties.

The reasons for this are plain. It does not lie with these defendants Moyer, holding property fraudulently as against Eldredge's creditors, to make this an affirmative defense. The assignee in bankruptcy has made no claim against them. There may be now no other creditors of Eldredge than these plaintiffs. The assignee may have sold to the plaintiffs this property fraudulently held. If, however, the defendants Moyer thought that other persons, creditors of Eldredge, represented by the assignee as their trustee, were entitled to share

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in the property fraudulently held by them, they should have set up this defect of parties. The plaintiffs might then have had an opportunity to show, for reasons above suggested or for other reasons, that there was no such defect. Another reason might exist why the assignee should not be a party. His right of action is limited to two years. (Rev. Stat. U. S., Sec. 5057.) This time begins to run, in a case like this, from his knowledge of the fraud. (*Bailey v. Glover*, 2 N. B. R., 26, 21 Wall., 342.) If the assignee then had had knowledge of this fraud, soon after his appointment, January 22, 1868, his time for commencing an action would have expired before this present action was commenced, in 1872. If that were so, it could not be claimed that the defendants Moyer would be entitled to retain this property, fraudulently transferred, as against judgment creditors of Eldredge.

If the defendants Moyer had set up this defect of parties, and the plaintiffs had chosen so to do, they could have brought in the assignee as a party to the action. But since this defect was not set up in the answer, and the defendants Moyer went to trial on two issues: that of denial of the fraud, and that of a discharge of the debt: and failed on these; it is too late now for them to set up that the assignee should have been a party.

In *Sands v. Codwise* (2 Johns., 486), an action was brought by creditors against a bankrupt, making the assignee a party defendant, on the ground of his refusal to prosecute. It was held not necessary to substitute a person who had been appointed a new assignee. From this it appears that the fact of the appointment of an assignee is not a bar or defense to the action. It only shows a defect of parties. The cause of action is good enough; only, if the defendant so claims, another party should be brought in. But if the defendant waives this, by not setting it up in the answer, then the action proceeds, and the fact that an assignee has been appointed is no defense on the trial.

For it is evident, as above suggested, that there are cases where the assignee would really be only a nominal party; as, for instance, where there were no other creditors but those who

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had joined as plaintiffs. And we must notice that, in this case, the question is not between these judgment creditors, plaintiffs, on the one side and the assignee in bankruptcy on the other. It is between judgment creditors on one side and fraudulent holders of the debtor's property on the other. The defendants Moyer are not trying to protect other creditors (if there be any) of the bankrupt, but they are trying themselves to keep what they took for the purpose of defrauding creditors. If in good faith they had desired to protect other supposed creditors, they should have averred the appointment and existence of an assignee in bankruptcy (if he has not been discharged of his office), and should have caused him to be made a party.

Whether such an assignee could recover of these plaintiffs, as part of the bankrupt's estate, the amount of this present recovery, it is unnecessary to inquire. We have only to do with the liabilities of the defendants Moyer to these present plaintiffs under the issues joined herein.

The judgment should be affirmed, with costs.

BOARDMAN, J.—The defense of Eldredge's discharge in bankruptcy was not available against the plaintiff to Eldredge or the Moyers; the new judgment, since the discharge, obviates any possible effect of the discharge as to such judgment; that defense was therefore a nullity, and the evidence to sustain it was in fact incompetent and immaterial. Upon the pleadings and proofs, so far as they were effectual and competent, the only issue to be tried was the fraudulent transfer to the Moyers; that is found against the Moyers, and is sustained by the evidence given upon the trial.

But taking the case as it was tried; plaintiff, as a creditor of the bankrupt, had an equitable interest in his assets. The assignee in bankruptcy may have had the legal title, but the latter was not made a party to the action; the defendants do not object to that fact by their answer. Why, then, may not the plaintiff recover, at the peril of being compelled by the assignee to account for and pay over the amount of his recovery for ratable distribution among all the creditors, plain-

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tiff being one? (*Ex parte* Foster, 2 Story, 131, cited by Justice BUCKES.)

All the creditors are *cestuis que trust*, and alike interested in the amount collected; the assignee is the trustee. I see, therefore, no good reason why the recovery may not be allowed to stand, and the plaintiff be allowed to receive the same, subject to any rights which the assignee in bankruptcy or the other creditors of the bankrupt may have therein. It having been determined that the title of the Moyers is fraudulent, there is very little virtue or propriety in aiding them in retaining the fruits of their fraud, as against a plaintiff who is entitled in equity to the whole or some portion thereof.

I therefore concur with Mr. Justice LEARNED in an affirmance of this judgment, with costs.

BUCKES, J. (dissenting).—It is insisted, in the first place, that the defendants Henry and Betsey Moyer have not well pleaded the proceedings in bankruptcy taken by Eldredge, so as to entitle them to the defense urged, to wit: that the right to maintain the action vested in the assignee in bankruptcy only. Those defendants allege in their answers, in substance, that a decree was duly made in the United States District Court, at a time and place named, by which the defendant Eldredge was discharged from his debts; and further, as follows: "of all which proceedings in said court in bankruptcy for such discharge, the plaintiffs had due notice." The discharge of the bankrupt was alleged, as was also knowledge by the plaintiffs of the proceedings in bankruptcy on which the discharge was based; the matter of defense intended to be interposed was distinctly and plainly set forth in the answers, and no objection for informality was raised until on the trial. If the objection was that the answers were indefinite and uncertain in their averments, it should have been put forward by motion. (Code, Sec. 160.) No objection having been interposed to the pleadings until on the trial, the case stands upon the sufficiency of the defense set up in the answers, and evidence in its support was admissible; even if it were true that

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those pleadings were obnoxious to objection, had it been raised by motion under Section 160 of the Code, or by special demurrer. Again, the United States District Court is not a court of inferior jurisdiction (8 N. Y., 254), nor a foreign tribunal; special averments with a view to show jurisdiction were not, therefore, necessary. Thus it seems that the answers were sufficient under the Code (Sec. 161) to admit proof of every necessary step required by law to establish the adjudication set forth therein. One of the requisite steps, according to the provisions of the Bankrupt Law, before a discharge could be granted, was the appointment of an assignee; and the assignment to him, by the judge or register, vested in such assignee the title to all the bankrupt's property by operation of law. It is urged that the averment of the decree for the bankrupt's discharge did not include an allegation of an assignment, or change of the title; the decree of bankruptcy, appointment of an assignee, and the assignment to the latter, were necessary incidents of the discharge; no discharge could be granted without compliance with these formalities; they were therefore within the purview of the answers which averred the discharge, with knowledge to the plaintiffs of the proceedings on which it was based, because a necessary concomitant of it. What is necessarily understood or implied in a pleading, forms a part of it as much as if it were expressed. (*Partridge v. Badger*, 25 Barb., 170.) It seems, also, that the referee admitted the evidence as competent under the pleadings; the plaintiffs cannot now insist that this ruling was wrong, and ask that the evidence as admitted be stricken from the case, or be disregarded, for if the evidence had been excluded as incompetent under the pleadings, the defendant could have moved for an amendment. The evidence, however, was received as competent, not in part, but in its entirety, and it was taken into consideration by the referee in his decision of the case; for he finds expressly "that *under the pleadings and proofs* the plaintiffs have a perfect right to maintain this action;" and further, "that the defendant, Eldredge, having waived his discharge in bankruptcy, such discharge is, under the pleadings in this

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action, unavailable to the other defendants as a defense, *and neither it (discharge) nor the assignment* connected therewith, furnishes any bar to the plaintiffs' right of recovery in this action." It does not lie with the plaintiffs now, as I think, to insist that the evidence received by the referee as competent, was inadmissible by reason of informality in the pleadings, hence now to be disregarded on the appeal; but in point of fact the *bankruptcy* of Eldredge was pleaded, and this was the *alleged defense*. It was proved before the referee, but was held "unavailable" because not interposed by Eldredge himself. We are bound, as I think, to accept the case on the pleadings and proofs as it was made before the referee, and accepted by him, and see whether his conclusion (that under the pleadings and proofs the plaintiffs have a perfect right to maintain the action) was sound in law.

It is insisted, and the referee so held, that the discharge of Eldredge was personal to himself: a personal privilege which he alone could set up or waive as he might elect. This may be, and probably is so, as regards the right to use the discharge as a protection against legal proceedings, having in view the appropriation of his own property to the payment of his debts. Here, however, the case is different and of much broader import. The contest here relates to property to which he has no title whatever—property, all right to which has passed to his creditors by operation of law. In this particular case, indeed, he could not claim the aid of the court in requiring its application to his debts pursuant to the Bankrupt Law, nor could he claim any surplus that might remain, arising therefrom, after satisfaction of all his debts, for he has concluded himself, by his fraudulent confederation with the Moyers, from all advantages to himself which otherwise might, by a remote possibility, result to him. Now the discharge must be considered with reference to all rights given to his creditors, in its acquirement through the proceedings in the Bankruptcy Court. Those rights exist, beyond his control, by virtue of those proceedings. They are settled and definitely determined by law. As regards the creditors' rights, he is put aside. To adopt the

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language of Judge STORY, the Bankrupt Act "manifestly contemplates that as to all property and rights of property of the bankrupt, and as to all suits in law and equity pending, in which the bankrupt is a party, the bankrupt is to be treated as if he were *civiliter mortuus*, and all his property and rights of property were vested in the assignee, as his executor or administrator." So he has no longer any power for good or harm to the creditors. Therefore, whether he waive or assert his privilege, it can in no way affect any person in his claim to the property liable to his debts, hence cannot deprive even a fraudulent holder of his right to show where the title rests, to the end that he may continue in its enjoyment until called upon to surrender it by the person or persons to whom it by law belongs. So the fraudulent grantees in this case may set up and show that the right sought to be enforced by the plaintiffs does not belong to them to exercise. This defense inheres to them. They cannot be deprived of it by any thing that Eldredge may do or may omit to do. They will stand or fall by their own pleading, and the matters of defense therein alleged. So whether Eldredge assert this privilege and set up his discharge, or omit to do so, it in no way affects either his creditors or the Moyers in their rights. And it follows that his confessions of judgment for the debts barred by his discharge cannot operate to their disadvantage. I understand it to have been repeatedly decided that the debtor's bankruptcy may be pleaded in bar to a creditors' bill brought by individual creditors, after bankruptcy, by any of the defendants; or, which is the same thing, that such defense is available to defeat the action; and this brings us to consider the real and true question in this case. Eldredge's bankruptcy was pleaded and proved in this action, and it stands certified in the record as a fact found by the referee. Did such fact bar this action by the creditors? Did the right to maintain this action rest with the assignee in bankruptcy only? The referee held that Eldredge's bankruptcy did not bar the action by his creditors. He held that neither the discharge of Eldredge from his debts under the Bankrupt Law, nor the assignment connected therewith furnished any

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bar to the plaintiffs' right of recovery, as prayed for in the complaint. In this conclusion of law, I think, the learned referee was in error. The plaintiffs had no lien on the property held by the Moyers in fraud of the rights of the creditors of Eldredge, and by this action sought to be reached and applied in satisfaction of their demands, when the assignment was made to the assignee in bankruptcy, and the transfer became effectual to vest in the latter all the bankrupt's property, including the right to this property in suit. Now, all rights in regard to this property having vested in the assignee for the benefit of the creditors generally, the latter became, to all intents and purposes, the trustee for all; and it rested with him alone, as assignee, to take proceedings against the fraudulent transferees of Eldredge's property to obtain it and its avails for general and equal distribution. It was well said in *Goodwin v. Sharkey* (5 Abbott [N. S.], 64, 68), that by force of the Bankrupt Law, and in virtue of the proceedings taken under it, the assignee represents and has become a trustee for all the creditors of the bankrupt, as well as for the bankrupt himself, and is vested with every right which was possessed either by the bankrupt or the creditors in respect to fraudulent conveyances; and it was also stated in the same case, that if the property, or the right to recover, be vested in the assignee in bankruptcy for the equal benefit of all the creditors, it needs no argument to prove that no one creditor can, through the agency of the State laws, obtain a preference over other creditors, or the application of any part of the bankrupt's property for his exclusive benefit. These views are, undoubtedly, sound, and they are the universal expression of the courts on the subject. (*Lowry v. Coulter*, 9 Penn. St. Rep., 349; *Thurmond v. Andrews*, 13 N. B. R., 157; *McCabe v. Cooney*, 2 Sandf. Ch. [m. p.], 314; 10 B. Mon., 452; *Ocean National Bank v. Olcott*, 46 N. Y., 12.) The cases all hold that, by virtue of the bankruptcy proceedings, the bankrupt's property, as well as all rights of creditors touching property fraudulently transferred by him, are brought within the exclusive custody and control of the Bankruptcy Court. In this way only can an equal dis-

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tribution among all the creditors be secured. The Bankrupt Law is based on the principle that "equality is equity," and whatever countervails the object and policy of the law operates as a fraud upon its provisions. So it was laid down in principle by Judge STORY in *Ex parte Foster* (2 Story, 131), that if a creditor, knowing of the proceedings in bankruptcy, should, by a proceeding in a State Court, appropriate the property of the bankrupt, or its avails, to his individual debt, it would be a fraud upon the law, and he would not be allowed to hold the money thus acquired. It seems, therefore, well settled, both on principle and authority, that, after the debtor is in bankruptcy, no one but the assignee can maintain an action to set aside a fraudulent conveyance made by the bankrupt, or to reach property held by third parties in fraud of the creditors' rights. This being the settled rule of law, the referee was in error in holding that the proceedings in bankruptcy put in evidence in this case did not bar the action.

It is urged that the assignee has not intervened to obtain the property from the fraudulent holders, and *non constat* that he ever will take proceedings for that purpose; and that if he does not, or will not, then the fraudulent holders will continue unmolested in the fraud, and the creditors of Eldredge will be wholly remediless in the premises. But this is a mistaken view of the case, as regards the latter branch of the proposition. In the first place, even if the assignee has omitted his duty, it is enough for the defendants to show that the plaintiffs have no ground of action on the facts charged and proved. However groundless the defendants' position may be when the rightful party demands the property, it is sufficient for them to show that the plaintiffs have no right to it under the proceedings which they have adopted for redress. But while it is held that the right to proceed to set aside a fraudulent transfer of property by a bankrupt rests with the assignee, and with him alone in the performance of his proper and lawful trust obligations, still, when he violates those obligations by an inexcusable neglect, or willful omission of duty in that behalf, the creditors have an ample and efficient remedy. Their position is like:

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that of creditors of a deceased debtor. It is the duty of an executor or administrator of a deceased debtor, whose estate is insolvent, to impeach the sale of personal property made by the deceased with intent to defraud creditors, and recover the same from the fraudulent vendee; and ordinarily a creditor of the estate cannot maintain an action against such fraudulent vendee alone, or against him and the executor or administrator, to set aside the fraudulent transfer and have the property held under it administered as assets to pay debts. Yet, if the executor or administrator collude with the fraudulent vendee, or after reasonable request refuse to take proceedings to impeach his title and reach the property in his hands, a creditor may maintain an action against him and the executor or administrator for that purpose. (*Bate v. Graham*, 11 N. Y., 237.) There was a similar ruling in the early case of *Sands v. Codwise* (4 Johns., 536), which, in many of its features, resembles the one in hand. That was an action in equity by the creditors of Comfort Sands to set aside various fraudulent transfers of property, and to have the property and its avails applied on their claims and demands. Sands had been put in bankruptcy, and one Kibbe had been appointed assignee, in whom all rights of property pertaining to the bankrupt and his estate had vested. In that case, unlike this one at bar, the assignee, Kibbe, was made a party defendant; and *in order to give the case standing in court*, it was charged against Kibbe that the complainants had applied to him for permission to use his name in such proceedings at law or in equity as should be necessary for the creditors of Sands to obtain justice, and to have the property, which had been fraudulently conveyed or concealed, applied to the payment of his debts, and had offered, in case he would consent, to indemnify him against all costs and expenses; but that Kibbe declined, and took no steps to get possession of the property so conveyed. Kibbe appeared in the suit and answered the complaint. He admitted that, upon application of the complainants, he had refused to prosecute the suit, but insisted that if the deeds should be set aside, then the proceeds of the estate should be paid to him, to be distributed according

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to law. The court sustained this claim of the assignee. It was decided, (1) that the creditors could maintain the action, but only through the assignee's title by making him a party, and on the ground that he had neglected or violated his duty as assignee in refusing to prosecute the action himself; and (2) that the avails of the property obtained under the proceeding should be paid over to him for general distribution among all the creditors, according to the provisions of the Bankruptcy Act. In this case the objection that the action could not be maintained, because the creditors could not be admitted to substitute themselves for the assignee, was answered by the chancellor thus: that being interested in the fund intrusted to the management of the assignee, and the latter having neglected or refused to do the duties legally imposed on him, the creditors might pursue their interests by bringing the action themselves at the peril of costs, and he puts the right to maintain the action by the creditors expressly on this ground. In another part of the opinion the chancellor further remarked as follows: "If the defendant, Kibbe, had not grossly neglected his duty as assignee, the latter must, of course, as the legal organ, constituted under the laws of the United States to manage the interests of the creditors, retain the power of managing it in his discretion for the benefit of those creditors generally; for the right of the complainants (creditors) to prosecute must originate in some palpable neglect or positive refusal of the assignee to perform a duty apparently in advancement of the trust, as to the precise subject in which the creditors collectively seek to establish their rights;" and he adds, "it was not pretended that the Court of Chancery could change the assignee; all that could be expected was to enable the parties in interest to enforce the rights which the assignee was disinclined, either from negligence or sinister motives, to give effect to;" so the action was upheld on the ground of necessity, in order to prevent a failure of justice. This was also the basis of the decision in *Bate v. Graham* (*supra*); these views of the chancellor received the sanction of all the members of the Court of Errors who took part in its decision. Judge SPENCER,

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in a few terse sentences, put the case in a clear light; he observed, "that whenever an assignee declines to act, the creditors have a right to institute a suit for the benefit of all the creditors; by the law of the United States, the property of the bankrupt is vested in his assignees; the conveyances being adjudged fraudulent and void, the property remained in Comfort Sands, and by the Bankrupt Law became vested in his assignees; the conveyances were void at common law, but the Court of Chancery had a concurrent jurisdiction, it being a case of fraud, and the application to that court was merely for the purpose of avoiding the conveyances. It does not follow that, because the Court of Chancery had this cognizance of the cause, it is to take the property out of the hands of the assignee and place it in the hands of a master; having disencumbered the estate of the conveyances, the property remained as if those deeds had never existed, *and being vested by the law of the United States in the assignee, no court can divest it.*" I have quoted freely and perhaps needlessly from this case, but it seemed to me that the great similarity between that and the one in hand, *on the facts*, gave pertinency and directness here to the remarks and line of reasoning of the distinguished jurist who had the case under consideration. The only difference between the two cases *on the facts* is this, that here the bankrupt confessed judgment on the discharged debts. But this, as we have seen, could not in any way affect his creditors in their rights, secured to them by the Bankruptcy Law. As said by Judge STORY, as to those rights he was *civiliter mortuus*; hence, the galvanizing of him into activity was impotent to defeat the provisions of the law. It is urged that in the case now before the court, the absence of the assignee from the record only raises a question of defect of parties plaintiff or defendant, and the objection that there is a defect of parties must be deemed waived because not raised by answer. But it must be held in mind (the bankruptcy proceedings being in evidence) that the plaintiff's claim or right to the property, sought to be reached in this action, is solely and only through the assignee. This is the defense in the action. The defen-

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dants set up and prove the bankruptcy proceedings to establish the defense, to wit: that the plaintiffs have no right of action save through the assignee and under his title or right. This was held in the case above cited. (*Sands v. Codwise*.) It was there held that the creditors of the bankrupt might maintain the action, but only through the assignee and his title; and on distinct and issuable averments in the complaint that he had neglected or violated his duty. Therefore, in the absence of the assignee from the record, and without such averment, the plaintiffs fail to show any right in themselves to take the proceeding. The chancellor said, and sustained the right of action on this ground, that the right of the creditors "to prosecute must originate in some palpable neglect or positive refusal of the assignee to perform his duty." This is the doctrine laid down in *Bate v. Graham*. It was there held, in substance, that the action could not be maintained by the creditors, except upon the fact proved or admitted by the pleadings, that the administrator was acting collusively, or in some way in violation of his duty, and, to save the case, force and effect was given to his answer, wherein he denied that the assignment sought to be impeached was made or executed with fraudulent intent. The difficulty in this case is therefore of a more serious character than is one resting simply on a defect of parties. It reaches the plaintiffs' right to take the proceeding; goes to their right to maintain the action; such right, under the proof in this case as it now stands, rests with the assignee solely. Until it be made to appear that he has refused to prosecute, or has in some way so conducted that the right to prosecute has been cast over to the creditors, they are without right of action, and it may be here added that if the right had been so cast over to them, they must effectuate their purpose of reaching the property in controversy *through the assignee and his title or right*. There is nothing in the pleadings, or in the proof, showing a transfer to the creditors of a right of action; nor was the case tried, nor is it now presented for our consideration, on any such hypothesis. As above suggested, the difficulty is not merely one growing out of a defect of

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parties plaintiff or defendant, but it reaches the right of the plaintiffs to maintain the action on the theory of the complaint, on which theory it was tried and decided by the referee. The conclusions hereinabove reached, if sound, require a reversal of the judgment appealed from. I am of the opinion that on the facts here proved, the creditors of Eldredge could not maintain this action to reach the property in controversy, or its avails, except through the assignee in bankruptcy, under his title and rights as assignee, on the ground that he had neglected or refused to perform his duty in that behalf; and further, that the avails resulting from a successful prosecution of the suit would belong to all the creditors, for distribution according to the provisions of the Bankrupt Law.

Judgment should be reversed and a new trial ordered, with costs to abide the event.

Judgment affirmed, with costs.

UNITED STATES DISTRICT COURT—CALIFORNIA.

APRIL 5, 1876.

The sale on execution of either or both the partners' interest in the joint assets gives to the purchaser only an interest in such assets as may remain after the payment of the partnership debts.

The fact that the interest of both partners were sold on separate executions to the same purchaser can have no effect to enlarge the interest of either partner acquired by such purchaser on the separate sale of such interest, nor to discharge the assets from liability for the partnership debts.

Premises used by partners for the purpose of carrying on their business *prima facie* form part of the partnership property; but this presumption may be rebutted.

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S. P. Hall, for complainant.

J. W. Winans, for defendant.

HOFFMAN, J.—The facts as admitted by the parties at the return of the rule to show cause are as follows: On the ninth

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day of October, 1875, Isaac Pollard and Alexander A. Cook filed their petition praying to be adjudged bankrupts individually and as a firm, and on the same day were so adjudged. On the fifth day of October, three days previously to the commencement of the proceedings in bankruptcy, judgments were obtained against Pollard and Cook, respectively, in two several suits instituted against them by a separate creditor of each. The interest of each in certain leasehold property described in the bill was levied on by the sheriff, and subsequently sold under the several executions. The sale took place subsequently to the proceedings in bankruptcy. No order enjoining the sale had been obtained. The plaintiff in each of the suits was the same person. The property was bid in by his agent. The interest of Pollard was sold for two hundred and fifty-two dollars and fourteen cents, and that of Cook for one hundred and twenty-seven dollars and seventy cents.

The execution against Pollard was for two hundred and seven dollars, with interest and costs. That against Cook was for eighty-five dollars and sixty-five cents, with interest and costs. Certificates of sale were duly issued to the purchaser at the execution. These certificates are alleged to have been subsequently assigned to one J. S. Lutz, a *bona fide* purchaser for value, and without notice of any irregularity or invalidity in the sales. They were subsequently assigned to the defendant who, the bill avers, has since collected rents of the sub-tenants, and has sued one of them who declines to pay. The complainant avers that the leasehold property thus sold was the property of the firm and constitutes a part of the joint assets. I do not deem it necessary at this stage of the proceedings to consider the question how far the right of a judgment creditor to sell property of the debtor, levied on before the commencement of proceedings in bankruptcy, is affected by the fact that such proceedings have been instituted, and the title of the bankrupt divested before the sale is actually made. I will assume that the purchaser, at the execution, acquired all the right and title which each of the judgment debtors separately had in the property sold, and that the present defendant has succeeded to

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those rights. But if the property levied on was firm assets, what was the interest of each partner, which his separate creditors could levy on and apply to the satisfaction of their claims? Evidently his interest in the firm, *i.e.*, his share of the surplus that might remain after all the partnership debts were paid. Mr. Collyer, in his work on partnership, states, as undoubted law, that where the separate creditor of one partner has taken partnership property in execution for his separate debt, the other partners may file their bill against the separate creditor, the debtor partner and the sheriff, praying a general account of the partnership and payment of what is due to them, and that the creditor and sheriff may be enjoined from proceeding under the execution and selling the stock and effects, and a Court of Equity will give relief accordingly. (Section 831.) And the same relief is given in favor of the assignees in bankruptcy. (15 Vesey, 599; 4 Vesey, 396.) In *Moody v. Payne*, 2 Johns. Ch. R., 548, Mr. Ch. Kent refused to enjoin an execution and sale until the partnership accounts were taken and liquidated, on the ground of the absence of precedents. But Mr. J. Story considers this an insufficient reason for denying the injunction, and Mr. Ch. Kent admits in his commentaries (vol. 3, p. 65, 5th ed. *in nota*) that the more fit and suitable rule of practice would seem to be to have the adjustment of the partnership accounts precede the sale. In *Douglas v. Winslow*, 20 Maine, 89, Mr. Justice Weston, speaking of the right of a separate creditor to attach the interest of one partner in the goods of the firm, says: "This right has been repeatedly exercised, and has never been defeated so far as the cases have come to our knowledge, unless in behalf of partnership creditors." So in *Tappan v. Blaisdell*, 5 N. H., 190, it is said by Richardson, C. J., to be well settled that partnership property cannot be holden to pay the separate debt of an individual partner, until all the partnership debts are paid. All that can be taken is the interest of the debtor in the firm—not the partnership effects themselves, but the right of the partner to a share of the surplus that may remain after all the debts are paid."

In Vermont the partnership creditors are in equity pre-

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ferred to separate creditors out of the partnership assets of an insolvent firm, notwithstanding the separate creditors have first attached those assets. (*Washburn v. Bk. of B. F.*, 10 Law Rep., 269; *Bardwell v. Perry*, id., 257.) Mr. Ch. Kent states the rule to be "that partnership effects cannot be taken by attachment, or held on execution to satisfy a creditor of one of the partners only, except it be to the extent of the interest of such separate partner in the effects of the settlement of all accounts. The sale is made subject to the partnership debts, and is, in effect, only a sale of the undefined surplus interest of the partner defendant after the partnership debts are paid." He adds in a note, "The doctrine of moieties is now exploded, and the creditors under execution or process of foreign attachment, or assignees of a partner or purchasers at sheriffs' sales, can take only the interest of the debtor in the partnership funds, subject to the accounts of the partnership. That interest, and not the partnership effects, is sold, and that interest is merely the share found to belong to the debtor upon an adjustment in equity of the partnership accounts." (See Story on Partn., Secs. 261, 262.) Mr. Gow on Partn., Sec. 365, says: "The levy under the execution transfers no part of the joint property. It merely gives the right to an account." I do not understand that these general and, indeed, elementary principles are denied. But it is contended that the purchaser at the executions, or his assignee, may now hold the partnership property bought by him freed from the claims of the joint creditors, because the interest of both parties has been levied on and purchased by him, and this accounting is not now asked for by either partner. No authority is cited for this position. The rights to be protected are those of the joint creditors; and perhaps those of the separate creditors might be involved if the plaintiff in the two suits against the individual partners is allowed to appropriate all the joint assets. The Bankrupt Act explicitly directs that the joint assets shall be first applied to the payment of joint debts, and the separate assets to the payment of separate debts. The right thus given to these classes of creditors, respectively, is absolute, and must be enforced by

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the court. It is conferred by law, and is not evolved out of, or through the equity of the partners, which is by some supposed to be the only foundation of the analogous rule of the Court of Chancery. The sale on execution of either or both the partners' interest in the joint assets in satisfaction of a separate debt gave to the purchaser, as we have seen, only an interest in the assets which might remain after the payment of the partnership debts. The fact that he purchased the interest of two of the partners sold on separate executions, can have no effect to enlarge the interest of either acquired on the separate sale of that interest. He took merely a right to an account and can now hold the partnership assets only subject to that account, and in entire subordination to the claims of the joint creditors. If, upon the settlement of the joint estate, any surplus should result in favor of either of the partners, it will belong to the purchaser of the interest of that partner, provided the judgment be valid and not obnoxious to any objection under the Bankruptcy Act. This is all the interest which the sheriff could sell, or has pretended to sell, and all the purchaser could acquire. In the case of *Menagh v. Whitwell*, 52 N. Y., 146, the question presented in this case was elaborately examined. It was there held, upon reasons which admit of no answer, that when a partner sells his interest to a stranger, or it is sold upon execution against him, his right to have the partnership debts paid, and his liability therefor discharged out of the property, are not divested by the sale. And this right is not affected by the fact that the separate interests of all the partners are thus disposed of. It was further held that partnership debts have, in equity, an inherent priority of claim to be discharged out of the partnership property, and as between a firm and his creditors, the title of the former to the joint property is not divested by any separate transfers to strangers by either one or all of the partners in payment of their individual debts, or by proceedings against them separately with reference to their individual interests, and when there has been no transfer by the firm, and the property remains in specie, and capable of being levied upon, it may be followed in the hands of those claiming

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by virtue of such transfers or proceedings, and may be levied on by a judgment creditor of the firm. I consider this authority decisive. The question whether the leasehold property was firm assets will of course remain open to contestation. Premises used by partners for the purpose of carrying on their trade *prima facie* form part of the partnership property. (*Featherstonhaugh v. Fenwick*, 17 Ves., 298.) But this presumption may be rebutted. Until this question can be determined, and an account taken, if the property be found to be firm assets, the injunction against the defendant must be retained. Perhaps the more regular course would be to appoint a receiver to collect the rents *pendente lite*. But I see no objection to permitting them to be collected by the assignee, to be held by him as a distinct and separate fund, and to be accounted for to the defendant if the property should not be found to be firm assets, and the judgments and levies prove to be regular and valid, or, if, after liquidating the partnership accounts, any surplus should result in favor of either partner individually. In the meantime, he should be enjoined from parting with the certificates, and collecting or attempting to collect the rents.

NEW YORK SUPREME COURT—THIRD DEPARTMENT.

JANUARY, 1877.

The exchange of a mortgage for notes, in pursuance of a parol contract that such mortgage should be given when the creditor asked for it, is not a preference under the provisions of the Bankrupt Act, although made within four months before the commencement of bankruptcy proceedings.

FRANKLIN V. HEWITT and EDGAR T. BRACKETT, Assignees, etc., Respondents, v. GEORGE NORTHUP and JOHN CAMPBELL, Appellants.

APPEAL from a judgment in favor of the plaintiffs, entered upon the trial of this action by the court without a jury.

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Batcheller & Hill, for the appellants.

A. Pond, for the respondents.

BOARDMAN, J.—Plaintiffs are assignees in bankruptcy of Campbell & Shaw; the petition of bankruptcy was filed September 10, 1874; the insolvency was of the partnership of Campbell & Shaw; Campbell, however, had individual property in excess of his individual debts. On the 10th of August, 1874, Campbell executed a mortgage of two thousand dollars on his individual property, to secure an individual debt to the defendant Northup, which was recorded; this mortgage was given in pursuance of a parol contract, that it should be given when Northup asked for it. The indebtedness of Campbell to Northup was for money lent by the latter to the former, prior to April, 1874, and for some interest accrued thereon; no doubt exists of the honesty of such indebtedness; on taking the mortgage, Northup gave up to Campbell his notes, given for the lent money. Between the 10th of August and 10th of September, 1874, creditors of the firm of Campbell & Shaw obtained judgments for large amounts against the firm, which judgments were duly docketed, and became a lien upon the individual real estate of said Campbell subsequent to said mortgage. The plaintiffs, having been appointed assignees in bankruptcy of said Campbell & Shaw, now bring this action to set aside said mortgage as a fraudulent transfer or incumbrance of the property of said Campbell, within four months before the filing of the petition; the decision of the Special Term sustains the plaintiffs' claim, and sets aside the defendant Northup's mortgage as against the plaintiffs. The result of such a judgment, if sustained, will be to give the judgment creditors of Campbell & Shaw, for partnership debts, the first lien upon the individual real estate of Campbell, one of the partners; it also seems to follow as a legal consequence, under Section 5021 of the United States Revised Statutes (page 976), that Northup, although an honest creditor of Campbell, will not be allowed to prove his debt in bankruptcy. These are serious consequences; are they such as justly flow from the

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transaction? To determine these questions, we must ascertain the relations of the several parties towards each other and their relative rights. I do not consider the question of plaintiffs' right to bring this action in a State Court, which may be doubted.

By the well-settled principles of equity, Northup, being an individual creditor of Campbell, was entitled to payment of the debt out of his individual property in preference to the creditors of the partnership firm of Campbell & Shaw. (*Wilder v. Keeler*, 3 Paige, 167; *Payne v. Matthews*, 6 id., 19; *In re Foot*, 12 N. B. R., 337.)

This distinction between the rights of partnership debtors and individual debtors is preserved in the Bankrupt Law (U. S. Stat., Sec. 5121), whereby the same rule must be applied in the marshaling of assets and in payment of debts.

Under these principles it is plain that Northup had an equitable lien upon Campbell's separate estate, in preference to the general creditors of Campbell & Shaw. The mortgage given by Campbell to Northup created a legal lien in place of such equitable lien, and thereby preserved his preference over the legal lien by judgment acquired by the firm creditors prior to bankruptcy proceedings. The relations between the individual and firm creditors were not changed by giving the mortgage; the mortgage, when given, gave to Northup no preference which he did not already possess; the firm creditors, therefore, lost nothing to which they were entitled; hence it follows that no preference was given to any creditor of Campbell; without a preference given, there could be no fraudulent intent to defeat or delay the operation of the Bankrupt Act, under the seventh subdivision of Section 5021, United States Revised Statutes.

These views are confirmed by several adjudged cases. In *Burnhisel v. Firman* (11 N. B. R., 505, 22 Wall., 170-178) it was held that a new mortgage, given within four months before bankruptcy proceedings, in lieu of a prior mortgage which was thereupon satisfied, is not open to attack under the Bankrupt Law as an illegal preference; the learned judge, quoting

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from *Starr v. Ellis* (6 Johns. Ch., 393), says: "It is a rule in equity that an incumbrance shall be kept alive, or considered extinguished, as shall most advance the justice of the case." To the same effect is *Sawyer v. Turpin* (13 N. B. R., 271, 1 Otto, 114). It was there held that a chattel mortgage, given in lien of a prior bill of sale without possession of the property, could not be impeached as a fraudulent preference under the Bankrupt Act, though given within four months before bankruptcy. The judge says: "It is too well settled to require discussion, that an exchange of securities within the four months is not a fraudulent preference within the meaning of the Bankrupt Law, even when the debtor and creditor know that the latter was insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it." There are many other cases to the same effect. (*Cook v. Tullis*, 9 N. B. R., 433, 18 Wall., 332; *Clark v. Iselin*, 11 N. B. R., 337, 21 Wall., 360; *Watson v. Taylor*, id., 378; *Montgomery v. Bucyrus Machine Works*, 14 N. B. R., 193, 2 Otto, 257; *Nat. Bk. of Pittsburg v. Brady's Bend Co.*, 5 N. B. R., 492; *In re Weaver*, 9 id., 132.)

There is another principle which in my view tends to confirm the result indicated. The assignee takes his estate subject to every equitable claim existing against it on the part of third persons; ordinarily the assignee stands in no better position than the assignor; hence it has been held that a contract for a mortgage or sale of real estate is preferred to judgments recovered after the contract; equity treats the agreement for a mortgage as a specific lien on the land. (*In the Matter of Howe*, 1 Paige, 125.) So it is held that "if a man mortgages by a defective conveyance, and there are subsequent creditors whose debts did not originally affect the land, equity will supply such defective conveyance against such subsequent incumbrancers who acquired a legal title afterwards, for since the subsequent creditors did not originally take the lands for their security, nor had in view an intention to affect them, when afterwards the lands are affected and they come in under the

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very person that is obliged, in conscience, to make the defective security good, they stand in his place, and shall be postponed to such defective conveyance." (*Burgh v. Francis*, 1 Eq. Cas. Ab., 320.) To the same effect is *Burn v. Burn* (3 Vesey, Jr., 573); *Finch v. Earl of Winchelsea* (1 Peere Williams, 277); and other authorities cited by the chancellor in *Matter of Howe* (1 Paige, 129, 130).

It is not necessary to hold that under our Bankrupt Law a debtor may give preference to one creditor over other creditors of the same degree, by the aid of a secret equity, or by virtue of an antecedent promise. (*Graham v. Stark*, 3 N. B. R., 357 [large ed., 93].) Indeed, as between such creditors, there should be no prevailing equity; the object and intent of the law is to prevent any such preference, and to compel a *pro rata* distribution of the assets of the bankrupt equally among creditors of the same class; but we have seen that Northup is not a creditor of the same class with the judgment creditors; he is entitled to be first paid out of Campbell's individual property, and it is neither equitable nor just that creditors of the firm, by judgment, should be preferred to him in hostility to the law applicable to such cases, and in evident violation of the spirit and intent of the Bankrupt Law; especially is this true when such judgments are subsequent to the equitable, if not legal lien of Northup's mortgage, and the rights of judgment creditors are in no respect worse than as by law is provided for them.

If these conclusions are not correct, Northup intended a fraud upon the Bankrupt Law. While endeavoring in good faith to secure his debt out of property which the law says shall first be applied to that purpose, he must have offended against that law, and as a consequence he shall not be allowed to prove his debt in bankruptcy, or receive any share of the bankrupt's estate. I think such consequences cannot, in justice and good conscience, result from the facts in this case.

The judgment should therefore be reversed, and a new trial granted, with costs to abide the event.

LEARNED, P. J., concurs.

Rhoads v. Blatt.

SUPREME COURT—PENNSYLVANIA.

MARCH 28, 1877.

An assignment for the benefit of creditors of "all the goods, chattels and effects and property of every kind, personal and mixed," does not pass the real estate to the assignee.

In a sale by an insolvent vendor, inadequacy of price is evidence of fraud, and the question of fraud on such sale should be left to the jury.

RHOADS v. BLATT.

ERROR to the Court of Common Pleas of Berks County.

On the 21st day of January, 1871, Samuel L. Rhoads obtained a judgment against Reuben Blatt.

On the 16th day of June, 1874, this judgment was marked to the use of John Wilhelm, the plaintiff in error.

On the 26th day of April, 1871, Reuben Blatt, being seized of an undivided interest in a farm which had descended to him and his brothers and sisters from their father, Benjamin K. Blatt, under the intestate laws, executed an assignment for the benefit of creditors, to John K. Derr, of "*all the goods, chattels and effects and property of every kind, personal and mixed, of said Reuben Blatt;*" which assignment was duly recorded on the day of its date.

On the 12th day of May, 1871, the assignee filed an inventory, wherein said interest was appraised at two thousand dollars.

It was afterwards the opinion of the assignee's counsel, and all the other counsel concerned, that the said real interest did not pass; and the assignee therefore assumed no control or possession of it.

The assigned estate of Reuben Blatt was settled, and proved totally insolvent, paying the creditors a *pro rata* dividend of only 23½ per centum.

On the 7th day of August, A.D. 1871, proceedings in partition were commenced, which proceedings culminated in Aaron Blatt, the brother of Reuben, accepting the above-men-

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tioned farm at the valuation thereof, to wit, twelve thousand nine hundred and twenty-six dollars, and entering into a recognizance to secure the shares of his brothers and sisters.

The widow died, and the interest of Reuben Blatt in the recognizance aforesaid was two thousand five hundred and eighty-three dollars and ninety-nine cents.

Reuben Blatt made assignments of portions of his interest in said recognizance to divers persons, some dated before and some after his assignment for the benefit of creditors, aggregating one thousand four hundred and twenty-three dollars and thirty-one cents, with a small amount of interest.

This left a balance of one thousand one hundred and fifty-nine dollars and ninety-eight cents, with interest, due Reuben from Aaron.

This attachment execution upon the judgment issued to No. 25, February Term, 1875, and was served upon Aaron Blatt, the person who owned said balance, and who was summoned as garnishee.

Upon being ruled to reply to interrogatories, the garnishee filed answers, admitting that he had in his possession the above balance, but alleged that Reuben had, on the 31st day of July, 1872, assigned it to J. Warren Tryon, Esq.

The cause was then put at issue, and upon the trial the plaintiff took the ground that said assignment had been made with intent to defraud the creditors of Reuben Blatt, and was therefore void.

The consideration mentioned in this assignment to Mr. Tryon is four hundred dollars, the receipt whereof is acknowledged therein.

Although Mr. Tryon was the party defending, and was present in court at the trial, there was no evidence offered to prove the payment of a valuable consideration by him to Blatt, excepting the acknowledgment of payment in the assignment.

The court held: 1st. That the real estate of Blatt passed to the assignee for the benefit of creditors. 2d. That if it did not pass, its subsequent conversion into personalty entitled the assignee for the benefit of creditors to receive it. 3d. That

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there was no evidence of fraud in the assignment to Mr. Tryon, and directed a verdict for the defendant, whereto the plaintiff excepted.

These rulings were assigned for error.

PAXSON, J.—It is manifest that the real estate of Reuben Blatt did not pass by his assignment for the benefit of creditors. By that instrument he assigned “all the goods, chattels and effects and property of every kind, personal and mixed, of the said Reuben Blatt.”

Whatever might have been the effect of the words “goods, chattels, effects, and property of every kind,” had they stood alone, the addition of the words “personal and mixed,” certainly limited them to personal estate. It is equally clear, that if the real estate did not pass by the assignment, the assignee could have no claim upon the proceeds thereof after a sale and conversion by the assignor.

The question of fraud should have been submitted to the jury. The learned judge refused the plaintiff's first point upon the ground that there was no evidence of fraud. This was error. The record shows that Blatt was insolvent. He had made an assignment for the benefit of his creditors. It appears from the report of the auditor that his estate yielded but a small dividend. The assignment to Mr. Tryon was of a claim of one thousand two hundred dollars, charged as a first lien upon a farm said to be worth thirteen thousand dollars. The consideration for the transfer of this claim was four hundred dollars. In a sale by an insolvent vendor, inadequacy of price is evidence of fraud. It was said in *Davidson v. Little*, 10 Harris, 245, that “the sale of lands or goods by an indebted person for less than their value is *ipso facto* a fraud in both vendor and vendee.”

Judgment reversed and a *venire facias de novo* awarded.

In re Merrill.

UNITED STATES DISTRICT COURT—VERMONT.

MAY 24, 1877.

When the bankrupt is dead a creditor offering himself as a witness to prove his claim cannot be excluded on the ground of interest.
The proof of debt against an estate in bankruptcy is a proceeding *in rem* and not a proceeding against a bankrupt nor against his executors or administrators in case of his death.

In re E. C. MERRILL.

DISTRICT OF VERMONT, ss.

Memorandum :—At the second and third meeting of creditors on the 16th day of April, A.D. 1877, Reed R. Wheeler, of Burton, in said district, proved his claims against said estate for over three thousand dollars.

The assignee objected to the allowance of this proof, whereupon an order was made by the register that the parties interested therein appear before him at his office in Newport, in said district, on the 12th day of May, A.D. 1877, at 10 o'clock A.M., for the purpose of hearing such questions as might arise in relation to the modification or expunging of said proof.

In pursuance of said order the parties appeared with their counsel before the undersigned register, at the time and place set for said hearing.

Inasmuch as the creditor had neglected to prove his claim before the second and third meeting of creditors, well knowing that the claim was disputable and would be contested by the assignee, and inasmuch as the settlement of the estate would be delayed on account of the adjustment of said proof through the neglect of the creditor in not seasonably proving his claim, so that its adjustment could have been had in the due course of settling the estate, the register ordered that the said Reed R. Wheeler deposit with the register the sum of forty dollars, to be applied in extinguishment of the costs of the assignee at such hearing so far as the same might become necessary.

No objection was made to this order. The subject matter

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of the creditor's proof consists of a long account which, up to December 1, 1871, consisted mainly of commissions on the sale of emery wheels which the bankrupt manufactured, and which it was conceded the said Reed R. Wheeler sold on commission up to that time as travelling agent of the bankrupt.

Said Wheeler claimed that, in October, 1872, he made a contract with the bankrupt by which he was to have wages for his services in making sales, at as high a price as said Merrill was paying any other of his employees, or as much as said Wheeler could make at his trade, which was that of a blacksmith, and that said services under the contract were to commence December 1, 1871, dating back from October, 1872, to December 1, 1871.

Said Wheeler continued his services, either on a commission or under a contract for wages up to the filing of the petition in bankruptcy, and after December 1, 1871, charged his services at one thousand dollars per year above expenses.

The assignee claimed that said Wheeler worked on commission all the time, and denied that said Wheeler made any contract with the bankrupt in October, 1872, or at any other time to work for wages.

The petition in this case was filed the 22d day of December, 1873, and said bankrupt deceased in February, 1874.

Said Wheeler offered himself as a witness to prove said contract, which he claimed he made with the bankrupt in October, 1872.

To his admissibility as a witness for this purpose the assignee objected. And the register ruled that said Wheeler was not an admissible witness for that purpose on account of the decease of said bankrupt with whom the contract was claimed to have been made. Counsel for said Wheeler desired that this question might be submitted to the District Court for their opinion thereon.

I therefore certify the same to the District Court for decision thereon.

JOHN L. EDWARDS,
Register in Bankruptcy.

In re Merrill.

WHEELER, J.—Upon the question concerning the competency of the creditor as a witness in his own favor, certified by the register, the law of the forum must, as a matter of course, govern. In these proceedings the courts of the United States constitute the forum, and consequently the laws of the United States must control in this respect. By those laws no witness can be excluded on account of interest except in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them. In all other respects the laws of the State govern. (Rev. Stat., Sec. 858.) By the laws of the State, where one party to a contract or cause of action in issue and on trial is dead, the other is excluded as a witness.

According to the State law this creditor would be excluded. Such exclusion, however, would be on account of interest of the witness, and contrary to the law of the United States, unless the case would fall within the exception contained in the proviso to the statute on this subject.

The proof of a debt against an estate in bankruptcy is not a proceeding against a bankrupt, nor his guardian if he have one, when he is alive, nor against his executor or administrator when he is dead, but is a proceeding *in rem* solely, and affects the estate only.

It is not an action against either an executor or administrator for or against whom any judgment can be rendered in it, and is not within the exception in the law of the United States.

The law of the United States prohibits the exclusion of this witness on account of his interest, and as it would seem, the law of the State, which, but for this prohibition, would exclude him, is not in force in this proceeding.

For these reasons, in the opinion of this court, the decision of the register, excluding the witness, is erroneous.

In re Lynch et al.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JUNE 30, 1877.

Proof of debt can only be taken in a foreign country before one of the officers authorized by Section 5079 of the Revised Statutes to do so.

In re ROBERT V. LYNCH AND WILLIAM EMBERSON.

I, JAMES F. DWIGHT, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings, and is thus stated: *Facts:* The attorneys for James Hardy, trading as James Hardy & Co., Nottingham, in the county of Nottinghamshire, kingdom of Great Britain, offered for filing a deposition for proof of debt, made by said Hardy and executed and acknowledged before one Fras. Geo. Rawson, United States Consular Agent at said Nottingham aforesaid, which deposition I refused to file "because not taken before any of the officers authorized by the 5079th Section of the Revised Statutes to take proofs of debt in a foreign country."

The attorneys for the creditors, Messrs. Arthur, Phelps, Knevals and Ransom, object to the decision of the register, rejecting the proof, and pray that the following question may be certified to the court for its decision: "Did the register err in refusing to file said deposition for proof of claim for the reasons indorsed thereon?"

As required by the practice I state as my *opinion* :

That the statute having designated before whom proofs may be taken in foreign countries, others are not authorized to take them.

All of which is respectfully submitted, this 29th of June, 1877.

(Signed) JAMES F. DWIGHT,
Register.

In re Alden.

BLATCHFORD, J.—Upon the certificate of James F. Dwight, register, etc., in charge of the above entitled matter, the following is the decision of the court:

The question is answered in the negative.

UNITED STATES DISTRICT COURT—MAINE.

Under the rules of practice in the district of Maine the United States District Court for that district will not confirm any sales made by an assignee, but will leave the purchaser to establish his title whenever the occasion may arise.

In re H. O. ALDEN.

UPON the application of the assignee of Hiram O. Alden, bankrupt, the register in charge of said cause, March 24, A.D. 1877, pursuant to 19th rule in bankruptcy of said court, issued to said assignee an order concerning sale of property by assignee, by which said assignee was ordered to sell at public auction certain real estate belonging to said bankrupt's estate, situate in the State of Illinois. Under this order of the court, the assignee advertised said property for sale at public auction in the manner provided by law. Said sale being advertised once a week, for three successive weeks, in the *Republican Journal*, a newspaper published in Belfast, county of Waldo, in said district of Maine, and being the newspaper regularly designated by the judge of said court for the publication of all notices of proceedings in bankruptcy in Waldo County. At the auction sale of the above premises, pursuant to the aforesaid advertisements, the lands in Illinois were bid off by Mr. Edward Alden, of Boston, who, thereupon, petitioned the court to approve and confirm said sale, and grant him a certificate of such confirmation under the seal of said court, with the view of enabling him, said purchaser, as he alleges, to perfect his title to said premises in accordance with the laws of the State

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of Illinois and the rules of the courts of said State regulating the transfer of real estate.

The register declined to issue such a certificate, and, on application of the petitioner, certified to the court that all the proceedings attending said sale had been regular, and were in accordance with the law and the rules of this court. The court thereupon passed the following order:

Fox, J.—The established practice in this district is for the court not to confirm any sales made by an assignee, but to leave the purchaser to establish his title whenever the occasion may arise. Such was the ruling in Donnell's case in Cumberland County, and it has ever since been adhered to.

UNITED STATES CIRCUIT COURT—E. D. VIRGINIA.

JUNE, 1877.

Where a decree operating as a lien upon defendant's estate has been obtained in a State Court, and the defendant afterwards goes into bankruptcy, proceedings under State Statute will not lie before a State officer against defendant for discovery of his estate similar to those given by Section 5086 of the Revised Statutes of the United States; they must be taken in the Bankruptcy Court. Where such proceedings are taken before a State officer, and the bankrupt is imprisoned by him, he will be released on *habeas corpus* by a U. S. Court, where the decree of the State Court is not for a fiduciary debt of the bankrupt.

Section 5117 does not embrace the surety in a guardian's bond among those not released by a discharge in bankruptcy.

Ex parte SAMUEL T. TAYLOR on Habeas Corpus.

In June, 1876, a decree was rendered by the Circuit Court of Accomac County, Virginia, in favor of Williams H. Walters and Mary E. E. Walters, infants, for four thousand five hundred dollars, against their guardian and his sureties, one of whom was Samuel T. Taylor, in a suit in chancery for a settlement of the guardian's account. Execution was issued upon this decree, which proved unavailing but established a lien

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upon the personal estate of Taylor. In the course of time steps were taken, under Section 5, Chapter 184 of the Code of Virginia (p. 1180), to elicit from Taylor by interrogatories, before Montcalm Oldham, a commissioner in chancery of said Circuit Court, a disclosure of his estate; the object of the proceeding being to make good the lien of the decree against the estate of Taylor when discovered.

On the 25th April, 1877, Taylor filed his petition in bankruptcy, and was adjudicated one: and received from the register a certificate of protection.

On the 9th day of May, 1877, he was arrested under an attachment issued by said Oldham, commissioner, to compel him to answer interrogatories filed in said suit in the said Circuit Court of Accomac, as before described, and held in prison by the county sheriff. On application to the judge of said court for release, on *habeas corpus*, his petition was refused, for the reason, as stated in arguments by counsel, that the State Judge was of opinion that the jurisdiction for that purpose was in the Bankruptcy Court. On the 11th June, 1877, Taylor petitioned the judges of the Circuit Court of the U. S., sitting at Richmond, for a writ of *habeas corpus*, which was awarded by the Circuit Judge, and on these proceedings the matter was adjourned to, and heard by the District Judge at Norfolk. The sheriff of Accomac County, having brought the petitioner here, before the court, made return according to the facts already stated.

HUGHES, J.—The first inquiry is, as to the jurisdiction of Commissioner Oldham to take the proceedings against Taylor, the petitioner, which are mentioned in the return made by the sheriff; the object of which is, the enforcement of the lien of the decree of the complainants, obtained upon the estate of Taylor in the suit of *Walters, etc., v. Byrd et al.*, a copy of the record of which suit is filed with the sheriff's return. The validity of the lien which has been mentioned is not disputed. It is a proceeding by one creditor of the bankrupt in another court, analogous to that which is given the assignee in bank.

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ruptcy and to any creditor in the Bankruptcy Court, by Sections 5086 and 5104 of the Revised Statutes of the United States. The proceeding of this commissioner raises the question: Which court has jurisdiction to ascertain and liquidate liens upon the estate of the bankrupt, and to require the bankrupt to make discovery of his estate? This question would seem to be answered in the mere statement of it.

Section 711, R. S. of the U. S., gives the United States Courts jurisdiction exclusive of the courts of the several States, amongst other things, of "all matters and proceedings in bankruptcy."

Section 4972 extends the jurisdiction of the U. S. District Court in bankruptcy, amongst other things, "to all causes and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens thereon; to the adjustment of the various priorities and conflicting interests of all parties," etc., etc.

Ancillary to this jurisdiction, Section 5086 empowers the District Court, "on the application of the assignee in bankruptcy or any creditor, or without any application, at all times to require the bankrupt to submit to examination under oath upon all matters relating to the disposal or disposition of his property." Therefore the Bankruptcy Court not only has exclusive jurisdiction over the estate of this bankrupt, but also of all "proceedings," such as that in question, looking to a liquidation, among other things, of the lien of the decree of the complainants in the suit of *Walters, etc., v. Byrd et al.*; and those creditors have even more ample power to probe the bankrupt's conscience and obtain a discovery of his estate in the Bankruptcy Court, than they have in the proceeding taken against him by Commissioner Oldham, even if that proceeding was legal.

That such a proceeding before a State officer, when against a debtor after he files his petition, and is adjudicated in bankruptcy, is illegal, strikes me to be as clear as any proposition of

In re Peck.

law can be. The proceeding before Commissioner Oldham being illegal and nugatory, the petitioner (the bankrupt) is not legally in the custody of the sheriff of Accomac.

The second inquiry is as to the jurisdiction of this court to discharge the bankrupt from this illegal custody. Section 5091 provides that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." So that the only question on this latter head is, whether or not the obligation of a surety upon a guardian's bond is one from which a bankrupt is released by his discharge in bankruptcy. There can be no doubt on this subject. The obligation of the guardian is a fiduciary one, from which the guardian himself cannot be discharged in bankruptcy; but that of the surety is not fiduciary within the terms and meaning of Section 5117 of the Bankrupt Law. The language of that section is, that no debt of a bankrupt, "created while acting in a fiduciary character, shall be discharged under this act;" language which refers only to the fiduciary himself, and not to his sureties.

The prisoner must therefore be discharged; but I will at once require him to submit before the register in bankruptcy to such interrogatories as the creditors in the decree of the State court shall desire to propound.

UNITED STATES DISTRICT COURT—VERMONT.

MAY 24, 1877.

Under the laws of Vermont an attachment of a debt by trustee process creates a lien on the funds in the hands of the trustee after service upon him, although no notice is given to the principal debtor. Such lien is a lien by attachment by meane process and will be saved when made

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the prescribed length of time before the commencement of the proceedings in bankruptcy.

In re J. Q. A. PECK.

To the Hon. District Court within and for the District of Vermont.

The undersigned register begs leave to report that on the 8th day of October, A.D. 1875, Horatio S. Loomis of Montpelier, in the county of Washington, administrator of Roswell R. Keith, late of said Montpelier, deceased, took out his writ of attachment in due form of law against the said J. Q. A. Peck as principal debtōr, and therein summoning Alonzo T. Keith of said Montpelier, as trustee of the said J. Q. A. Peck, and said writ was dated on said 8th day of October, and made returnable to the County Court then next to be holden at Montpelier, in the county of Washington on the second Tuesday of March, A.D. 1876, and in said writ the plaintiff declared specially upon three promissory notes—one for six hundred and sixty-one dollars and fifty-four cents, dated March 8, 1864, on demand and interest annually; one for one thousand four hundred and thirty-four dollars and forty-two cents, dated May 31, 1873, on demand and interest annually; and one for four thousand three hundred and thirty-five dollars, dated March 17, 1864, on demand and interest annually. On which first-named note was indorsed March 14, 1870, twenty-five dollars, and said last described note was indorsed May 15, 1866, seventy-nine dollars and ninety-seven cents, also September 1, 1874, the sum of three thousand one hundred and fifty dollars and five cents. The plaintiff also declared in a count in general assumpsit, and demanding in damages nine thousand dollars. Said writ was duly signed by Luther Newcomb, clerk of said County Court, and directed to any sheriff or constable in the State. And afterwards on said 8th day of October, the said plaintiff delivered said writ to D. W. Dudley, deputy sheriff within and for the county of Washington, to serve and return as the law requires. And said Dudley, as such deputy sheriff, on the 9th day of October, 1875, served the same writ on the said A. T.

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Keith, trustee, by delivering to him a true and attested copy of said writ with his, the said Dudley's, return thereon, and on the second day of March, 1876, the said Dudley, as such deputy sheriff, made further service of said writ on the said J. Q. A. Peck, by attaching as his property one chip, and on the same day delivered to him, the said J. Q. A. Peck, a true and attested copy of the original writ with his, the said Dudley's, return indorsed thereon.

And for greater particularity a copy of said writ and officer's return thereon is hereto attached and made a part of this report and marked "A."

Said writ was duly returned to the term of court when and where it was made returnable, and said cause was duly entered upon the docket of said court and continued from term to term of said court, and is now pending in said court. The trustee appeared in said court and filed his disclosure, a copy of which is hereto attached and marked "B."

On the 29th day of June, A.D. 1876, the said J. Q. A. Peck filed his petition in bankruptcy, in the District Court of the United States, and was thereafterwards on the same day duly adjudged a bankrupt, and said petition having been duly referred to a register, a first meeting of creditors was held on the 28th day of July, 1876, at which Joel Foster, Jr. was duly elected assignee of said bankrupt's estate, and said election was thereupon confirmed by the District Court.

On the 28th of July, 1876, the said Horatio S. Loomis, as administrator as aforesaid, proved said three promissory notes in said bankruptcy at the sum of eight thousand and fifty-nine dollars and fifty-three cents, and claiming in said proof that said three notes were secured by said trustee process, so served upon said trustee as aforesaid.

The assignee claiming that said proof should be modified so as to stand as a proof without security, and having made application to the undersigned register to hear and determine that matter, due notice was given said assignee and the said H. S. Loomis that said register would hear such matter at the office of Fifield, Pilkin & Porter in Montpelier, in the county of

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Washington, on the 8th day of March, 1877, at 10 o'clock A.M. At which time and place the said H. S. Loomis, as administrator as aforesaid, appeared before me with his counsel, Charles H. Heath and Homer W. Heaton, and the said Joel Foster, Jr., also appeared by himself and his counsel, C. W. Porter, when a full hearing was had touching the modification of said proof.

From the evidence submitted to him the register finds the foregoing facts and that there is a large sum due from the said Alonzo T. Keith to the said J. Q. A. Peck, which said Keith holds as trustee of said Peck, precisely how much did not appear from the evidence.

The said H. S. Loomis, as administrator as aforesaid, claimed that said proof should stand as made, and that he hold a lien upon the funds in the hands of the said Alonzo T. Keith by virtue of the service of said trustee process upon him more than four months before the filing of said petition in bankruptcy. It was claimed on the part of the assignee that no lien attached to said funds in the said Alonzo T. Keith's hands for the reason that said trustee's writ was not served upon the said J. Q. A. Peck till within four months next before the filing of said petition in bankruptcy.

I find that the said J. Q. A. Peck had no knowledge of said trustee process whatever, till said writ was served upon him as above stated on the second day of March, A.D. 1876, and for this reason it was also claimed that no lien was created.

From the foregoing facts the register decides that said proof ought not to be modified and that it stand as a secured claim as proved.

The register would recommend, if the court sustain the ruling of the register, that the parties be ordered to proceed in the County Court, where said cause is pending, and ascertain by the judgment of that court the amount due from the said A. T. Keith to the said J. Q. A. Peck, embraced in said suit, provided this can be done so as not to cause an unreasonable delay in settling the estate of the bankrupt in the District Court. So that if there is more due from the said A. T. Keith than suf-

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ficient to liquidate the plaintiff's claim in that suit, the balance may be available to the assignee in the bankrupt's estate.

All which is respectfully submitted.

JOHN L. EDWARDS,

Register in Bankruptcy.

Since said report was recommitted to me, such proceedings have been had in the County Court in Washington County, where said cause is pending, that the amount in the hands of the trustee has been fixed upon, and that amount it is agreed by counsel is four thousand three hundred and sixteen dollars and three cents, less trustee's costs, taxed and allowed at nine dollars and five cents, leaving in the hands of said trustee on which said lien is claimed four thousand three hundred and six dollars and ninety-eight cents. All which is respectfully submitted.

JOHN L. EDWARDS,

Register in Bankruptcy.

WHEELER, J.—With reference to the question in this cause certified by the register, it seems that the Bankrupt Act expressly saves liens by attachment on mesne process made the prescribed length of time before proceedings in bankruptcy from being dissolved by them. The attachment of a debt by trustee process in this State creates a lien that is so saved. (*Stoddard v. Locke*, 9 N. B. R., 71, 43 Vt., 574.) This has not been questioned in argument here, but it is insisted that to perfect the lien so that the time would begin to run, there should be service upon, or at least actual notice to the principal debtor. But this is governed by a positive provision of the law that applies exactly to the cases described in it and to no others and leaves no room for construction. The State law under which the lien is created does not require service on nor notice to the defendant in the process to have the lien attached. Service on the trustee is sufficient for that, if the subsequent proceedings are followed out to judgment. After service on the trustee, the lien on the funds in his hands exists and is valid

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unless there is some lapse in the proceedings that discharges him from them. This lien is a lien by attachment on mesne process from the beginning and falls within the description of those saved by the Bankrupt Act, and the holder of it appears to be entitled to have it saved under the act. Such attachment is of itself a sort of constructive notice to the defendant the same as an attachment of chattels is. For by looking after his debt he would find that attached in the hands of his debtor, as by looking after his chattels he would find them attached in the custody of the officer.

For these reasons this court is of opinion that the decision of the register is correct.

UNITED STATES CIRCUIT COURT—W. D. WISCONSIN.

The fact that persons have been adjudicated bankrupts as members of one firm is no bar to nor does it defeat a petitioner against them as partners with others in another firm.

As to whether the individual property of such persons should go to pay the debts of the former or of the latter firm, *quære*.

In re JEWETT & CO.

S. A. Pinney, for assignee of S. A. Jewett & Co.

W. F. Vilas, for E. D. and G. K. Jewett.

DRUMMOND, J.—These are the material facts in this case: There was a firm in Boston doing business under the name of Jewett & Pitcher, of which E. D. Jewett and George K. Jewett were members. We must assume, for the purposes of the decision, that there was also a firm transacting business in Wisconsin, of which S. A. Jewett, E. D. Jewett, and George K. Jewett were members, under the name of S. A. Jewett & Co.

In October, 1875, S. A. Jewett was a resident of Wisconsin, E. D. Jewett a resident of New Brunswick, Dominion of Canada, and George K. Jewett a resident of Maine. At that

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time a petition in bankruptcy was filed in the District Court of Massachusetts, against the firm of Jewett & Pitcher. All the other members of the firm, except E. D. Jewett and G. K. Jewett, were residents of Massachusetts. A decree in bankruptcy was rendered against that firm on the 25th of February, 1876, in the District Court of Massachusetts, and of course that decree proceeded against E. D. and G. K. Jewett, as members of the firm of Jewett & Pitcher; and it is alleged in the petition of review, that although E. D. Jewett was a resident of New Brunswick at the time the petition in bankruptcy was filed in Massachusetts, he afterwards changed his residence to Massachusetts, and appeared in the case as a party; and it is also alleged that both E. D. Jewett and G. K. Jewett filed their schedules in the case in Massachusetts, setting forth their debts and their assets jointly and individually. This is all that appears in relation to the proceedings in Massachusetts.

It is not stated that the bankrupt case is disposed of, or that the debts of the firm of Jewett & Pitcher are settled, or that they were discharged as bankrupts. The inference from the statement is, that the suit, as such, is still pending in the District Court of Massachusetts, or was at the time the facts, which are now to be mentioned, occurred.

In July, 1876, a petition in bankruptcy was filed in the District Court for the western district of Wisconsin, against the firm of S. A. Jewett & Co.—the Wisconsin firm—and of which E. D. Jewett and G. K. Jewett were members. E. D. Jewett and G. K. Jewett appeared to the petition and denied the acts of bankruptcy alleged, and among other things set forth the proceedings in the District Court of Massachusetts, which have already been referred to, that a decree in bankruptcy had been rendered against them as members of the firm of Jewett & Pitcher; and they insisted that constituted a bar, in the District Court of the western district of Wisconsin, to a decree of bankruptcy against them.

There were various questions argued by the counsel of the bankrupts, as I infer, in the District Court, and they have been again argued in the Circuit Court—most of which will have to

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remain, for the present, undecided. The District Court found a partnership to exist between the three persons, S. A., E. D., and G. K. Jewett, and held that the fact of a decree in bankruptcy against E. D. and G. K. Jewett, as members of the firm of Jewett & Pitcher, in the District Court of Massachusetts, was not a bar, or did not defeat the petition in bankruptcy in the District Court for this district.

And the only question now before this court is, whether that does constitute a bar to or defeats the petition in bankruptcy here. I think that the decree of the District Court was right.

The firm of S. A. Jewett & Co. were engaged in the lumber business in Wisconsin quite extensively, the business amounting, as is said, in the course of a year, to about one hundred thousand dollars. They had become embarrassed, and a petition in bankruptcy was filed against them. Their creditors insisted that their property should be administered by the court under the Bankrupt Law for the payment of their debts. There was no way in which this could be done except by a decree of bankruptcy against the partners; and it seems to me clear that the proper forum in which the decree should be rendered was that which existed in the district where they were transacting business, namely, in the western district of Wisconsin. There was no other way by which these partnership assets could be reached and administered in the Bankrupt Court, unless S. A. Jewett, as a member of the firm of which E. D. and G. K. Jewett were also members, was called, in some form, into the District Court of Massachusetts, and the assets of the firm of S. A. Jewett & Co. administered there, namely, the residuary interest which E. D. and G. K. Jewett had in them after the settlement of the claims against the firm of S. A. Jewett & Co.; because I assume that the only interest which E. D. and George K. Jewett, or their assignee had, either as representing the firm of Jewett & Pitcher, or themselves individually, was the residuary interest which they or either might have in the assets of S. A. Jewett & Co., after the payment of the debts of that firm.

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It is clear as a principle of law, it seems to me, that the assets—the firm assets—of S. A. Jewett & Co. must be administered in the District Court of this district, for the payment of the debts of that firm. It is also true that until all the debts are paid, neither E. D. Jewett nor George K. Jewett has any interest in these firm assets. It is equally true that the firm assets of Jewett & Pitcher must be administered in the District Court of Massachusetts.

Now S. A. Jewett has no interest whatever, residuary or otherwise, in the assets of Jewett & Pitcher; he is not concerned in that firm; of course, therefore, he could only be brought into the bankruptcy litigation in Massachusetts as a member of the firm of which two persons, parties to the litigation in that court, were also members. This being so, the only difficulty that can arise is as to the individual property of E. D. and George K. Jewett. The fact that they were adjudged bankrupts here, as members of the firm of S. A. Jewett & Co., does not necessarily dispose of all the questions that may arise concerning that property. It may be that many delicate and difficult questions may arise as to the property. For example, it appears that E. D. and George K. Jewett owned two-thirds of a large tract of land in this district, of which S. A. Jewett owned one-third.

It is claimed that a decree in bankruptcy, with the deed to the assignee in Massachusetts, clothed him not only with the title to the joint property, but also with that of the individual property of each member of the firm of Jewett & Pitcher. Now whether that individual property should go to pay debts of Jewett and Pitcher, if the joint property is not sufficient to accomplish that result, or to pay debts of S. A. Jewett & Co. of the Wisconsin firm, may be a very serious question, which I do not feel inclined to decide, or even intimate an opinion at present. The most that can be said is, that E. D. and George K. Jewett have already been adjudged bankrupts in the District Court of Massachusetts; they are again adjudged bankrupts in the District Court of the western district of Wisconsin. But in the one case they have been adjudged bankrupts as

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members of the firm of Jewett & Pitcher, and in the other of S. A. Jewett & Co.

Strictly, the District Court of the western district of Wisconsin, had the right to adjudge them bankrupts, as members of the firm of S. A. Jewett & Co. And this is all I care to decide at present. Therefore, as this petition was filed by E. D. and George K. Jewett, for the purpose of reviewing the decision of the District Court, and as I hold that decision was right, the order of the District Court decreeing them bankrupts will be affirmed. When hereafter it is ascertained what is the exact situation of the joint property of S. A. Jewett & Co., and of the individual property of the members of the firm in this district, a question may arise as to what shall be done with the latter, and how and by what means it shall be administered and for whose benefit.

UNITED STATES CIRCUIT COURT—W. D. WISCONSIN.

In the absence of prohibitory legislation by the State, the docketing of a transcript of judgment on a holiday is not void, but will confer a valid lien upon the real estate of the debtor in the county where it is filed.
Reversing S. C., 14 N. B. R., 388.

In re R. C. WORTHINGTON.

Mr. Cottrill, for assignee.

Mr. Winkler, for judgment creditors.

DRUMMOND, J.—On the twenty-fourth of December, 1874, Charles E. Storm and Robert Hill recovered a judgment against the bankrupt in the Circuit Court of Milwaukee County, for three thousand four hundred and sixty-four dollars (\$3,464.00).

On the following day a transcript of the docket was filed in the clerk's office of the Circuit Court in Wood County, where the bankrupt had, at the time, real estate. Several months

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after this, proceedings in bankruptcy were commenced, and Worthington was adjudged a bankrupt (in July, 1875).

The judgment creditors made an application to the District Court, to direct the assignee to sell the real estate of the bankrupt, and apply the proceeds to the payment of the judgment, and to permit them to prove their claims for any balance that might be found due. This application was denied by the District Court, on the ground that the act of filing the transcript by the clerk in Wood County was void, and gave the judgment creditors no lien upon the property, as it was done on Christmas day—a holiday under the law of this State.

By the law of this State, the clerk of the Circuit Court was required to keep a book for the entry of judgments, and immediately after entering the judgment the clerk was to file certain papers which were to constitute what was called the judgment roll, which was to contain a copy of the judgment; and after this was done he was to enter in an alphabetical docket, in books to be provided and kept by him, a statement of the judgment, and containing certain particulars as set forth in the statute, namely: the names of the parties, the amount of the debt or damages recovered, with the costs, the hour and day of entering in the docket, etc., and then the judgment became a lien upon the real estate of the debtor. And when it was sought to cause the real estate of the debtor to become bound by the judgment in any other county than that where it was rendered, it became necessary to file with the clerk of the Circuit Court of that county a transcript of the original docket, and from the time of filing it constituted a lien on the property of the debtor in that county.

The question then to be determined in this case, is, whether the act of the clerk in filing the transcript of the original docket in his office on Christmas day was a nullity under the laws of this State.

The statute declares that no court shall be open, or transact any business on the 22d of February or the 4th of July, unless to instruct or discharge a jury or to receive a verdict, and the 25th day of December and the 1st day of January are declared

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to be holidays. If the act of the clerk was void, it was so under the common law or these statutes.

At common law, Sunday was deemed a non-judicial day, during which no courts could transact any business or render any decree. Of course, at common law, some of the days which, under our practice, are deemed non-judicial, were unknown as such; and when they are so declared, the inference would be that the prohibition extends no farther than is named in the statute. It is hardly to be presumed that ordinary business cannot be transacted in this State, and binding contracts entered into, on the 22d day of February or the 4th of July, and the question is, whether because the 25th day of December and the 1st of January are declared to be holidays, that, therefore, no ministerial act can be performed on those days by an officer of this State. It may be conceded that on those days a clerk could not be required to perform any duty connected with his office, because the State has declared it a holiday; but that is a very different thing from asserting that every ministerial act done by the clerk voluntarily on those days is necessarily void. The statute in relation to the 22d of February and 4th of July was passed in 1861; but when there was legislation in 1862 as to the 25th of December and 1st of January, there was no prohibition in relation to the courts, except what might be inferred from the fact that they were declared holidays. It was not till afterwards (1869) that it was declared that when the day for the meeting of court should fall on a legal holiday, it should be adjourned to the following day.

While at the common law no judicial act could be done on Sunday, the authorities seem to agree that mere ministerial acts could be performed, and the service of process was regarded as a ministerial act, and therefore valid, although performed on Sunday, and the act of 29 Charles II. became necessary in order to render it invalid; and in the case of *Van Vechten v. Paddock*, 12 Johnson, 177, which is relied upon by the District Court, the Supreme Court of New York, in order to decide that the issuing of process on a Sunday was void, insisted that the awarding of process was a judicial act, done

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whilst the court was in actual session, being thus obliged to resort to an acknowledged fiction to sustain its opinion.

If ministerial acts performed on Sunday were not invalid at common law, for a stronger reason those performed on Christmas day would not be invalid. It is a curious fact that while the judge of the court who gave the opinion in *Van Vechten v. Paddock*, seems inclined to hold that the service of process on Sunday was illegal at common law, the judge who delivered the opinion in *Johnson v. Day*, 17 Pickering, 106, declares that an arrest on civil process on Sunday was legal at common law, and that is the opinion of the judge who decided the case of *Pearce v. Atwood*, 13 Mass., 324, where the subject is thoroughly discussed. The District Court relied upon the case of *Lampe v. Manning*, 38 Wis., 673, as deciding that the act of the clerk here in question was void. But in fact that case only decided that a trial and judgment rendered by a justice of the peace on the 23d day of February, and which, under the statute, it coming on Monday, was to be treated as the 22d—and, therefore, a holiday—were invalid, and should be regarded as a nullity, and the court says nothing about the effect of ministerial acts done on a holiday. The natural conclusion would seem to be, that when the State legislated in 1861, in relation to the 22d of February and 4th of July, and made prohibitions, and then again legislated in 1862, as to the 25th of December and 1st of January, the prohibitions should not, by construction merely, be enlarged.

It may be admitted that the entry of a judgment by which a man's property is to be bound, or, as it is termed in the statute of this State, the docketing of the same, is a very important act. The entry of the judgment is judicial, but is the docketing of the judgment by the clerk anything more than a ministerial act? There is no exercise of discretion or of judgment, but the language of the statute to him is mandatory. He *shall* do certain things, and they are particularly described, and in relation to them he can have no discretion; and it would seem that they were mere ministerial acts. And while this is true of the act of the clerk who docket the judgment in the

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court where it is rendered, it would seem that where it is transferred to another county and docketed there, that there could be, if possible, less doubt of the character of the act to be performed by the clerk of that county; because all that the statute requires is, that a transcript of the original docket shall be filed with the clerk of the Circuit Court of the county, so that all that is necessary for the clerk to do is simply to receive the transcript which is brought to him, and file it, and mark it with the date when it is filed. This certainly can be considered nothing more than a ministerial act, not void at common law, and, as I think, not rendered so by any statute of this State.

There does not seem to be any statute of this State which, when fairly considered, declares that no official act shall be performed on a holiday. In referring to holidays I do not intend to include Sundays, as to which there is considerable prohibitory legislation by this State, affecting business, public and private, labor, amusements and the service of civil process.

I think, therefore, the act of the clerk of the Circuit Court of Wood County in filing the docket transcript was not void, but that the judgment creditors acquired a lien on the real estate of the bankrupt in that county.

The order of the District Court will therefore be reversed;—but, as the judgment of this court cannot be reviewed in this case, I shall authorize the District Court, if it shall consider it best, to permit the judgment creditors to proceed on their judgment, and sell the real estate of the bankrupt in Wood County; and then if the other creditors of the bankrupt desire, the right of the purchaser to the property can be tested by the assignee.

UNITED STATES DISTRICT COURT—W. D. PENNSYLVANIA.

JUNE 28, 1877.

Where the assignee has sold real estate discharged of liens, he should allow interest on the liens to the date of making up his report of distribution.

In re Devore.

Attorney's commissions and costs stipulated to be paid on foreclosure are not allowable when the proceedings to foreclose are invalid.

When the Bankrupt Court has first taken jurisdiction by ordering a sale of mortgaged premises, discharged of liens, it thereby ousts a State Court of jurisdiction to foreclose the mortgage.

In re ABRAHAM A. DEVORE.

A. H. Miller, for exceptions.

P. C. Knox, for report.

KETCHAM, J.—In the matter of the exceptions to the report of Register Harper, ascertaining liens and distributing the fund arising from the sale of real estate, filed February 16, 1877:

First. The register should have allowed interest on the demand in this case up to the date of making up his report. It is not practicable to allow it beyond that date, as his report, when confirmed, must furnish the schedule of distribution in pursuance of which payment is to be made. He allowed interest up to September 15, 1876. He made up his report on February 15, 1877. Therefore interest for five months longer should be added to the amount reported. The amount of principal debt is three thousand and seventy-two dollars and sixty-five cents. The interest thereon for five months, and which should be added to the amount reported, is seventy-five dollars and fifty-four cents.

Second. The register made no error in reporting against the costs of the *scire facias* and the commissions of five per cent. as part of the *expense of foreclosure of the mortgage by scire facias*. The mortgage was not foreclosed. No legal and valid proceeding to foreclose was either carried to conclusion or commenced. The mortgage debtor was adjudicated bankrupt in February, 1876. The mortgagee, in June, 1876, issued a *scire facias*, not against the assignee in bankruptcy, but against the bankrupt, and without notice to the assignee, and procured the bankrupt's acceptance of service of the *scire facias*, and proceeded no further. The proceeding, as far as it went, was utterly invalid, for it was a suit upon a *scire facias* with but one party—without a defendant—and never could have

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been carried to a judgment that would bind the property in the hands of the assignee. It was a nullity, and no consideration for the five per cent. commission and costs stipulated to be paid on foreclosure. Moreover, there was no necessity for issuing the *scire facias* against anybody. The assignee in bankruptcy was appointed, and his appointment approved March 28, 1876. On May 29, 1876, he applied to the court and obtained an order to sell the mortgaged premises, and sold them July 8, 1876, discharged of liens, and produced the money distributed. In June, 1876, after the order of sale was granted to the assignee, the plaintiff's attorney says he issued his *scire facias* against the bankrupt and got his acceptance of service. For what purpose, with an order of sale out? The cases in First and Second Otto, cited by counsel for exceptant, have no application to the case. In the case in First Otto, the *scire facias* had been served upon the mortgagors, and the court had jurisdiction of the proper parties and had proceeded within a few days of a decree of foreclosure before the defendant went into bankruptcy. The decree was entered without noticing the assignee in bankruptcy, and was valid against the assignee as against any other alienee or transferee *pendente lite*. In the case in Second Otto, there was no question of parties; it was altogether a question of jurisdiction of the Circuit Court. But the bill in chancery originally went against the defendant, a bankrupt, and, on ascertaining the bankruptcy, it was afterwards amended, and the assignee was substituted, showing the necessity of making the assignee the defendant. We do not deem it necessary or important in this case to discuss the jurisdiction of the Common Pleas of Fayette County in the proceedings to foreclose this mortgage, in case it had gone on to foreclosure, yet there is no doubt that when the Bankrupt Court, as in this case, had first taken jurisdiction by ordering a sale of the mortgaged premises, discharged of liens, it ousted the jurisdiction of the Common Pleas. Both jurisdictions cannot deal with the same case at the same time. Therefore, to conclude:

The first exception is sustained and the report amended

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by awarding to the mortgagee's claim the aforesaid additional amount.

The second exception is overruled and the report confirmed as to that.

NEW YORK SUPREME COURT—FIRST DEPARTMENT.

MARCH, 1877.

An assignment to an assignee duly appointed in the bankruptcy proceedings dissolves the lien of an attachment levied within four months prior to the filing of the petition.

A debtor of the bankrupt who has, in ignorance of the appointment of an assignee, paid the amount of his indebtedness to the sheriff under an execution in the attachment suit, is not thereby relieved from his liability to the assignee.

J. DAVIS DUFFIELD et al., Assignees of CHARLES T. YERKES & CO., Appellants, v. HARRY L. HORTON and DAVIS JOHNSON, Respondents.

APPEAL from a judgment in favor of the defendants, entered upon the trial of this action by the court, without a jury.

Sidney S. Harris, for the appellants.

The filing of the petition in bankruptcy, followed by the adjudication of Yerkes as a bankrupt, dissolved the attachment issued in the suit of *Bouvier v. Yerkes*. (Bankrupt Act, 1867, Sec. 14; *Miller v. Bowles*, 10 N. B. R., 515; 58 N. Y., 263; *In re Preston*, 6 N. B. R., 545.) Bouvier had no lien at the time he recovered judgment, and acquired none by the recovery of the judgment or the issuing of the execution. (*In re Hinds*, 3 N. B. R., 351; *Edmeston v. Lyde*, 1 Paige, 637; *Corning v. White*, 2 id., 567; *Carroll v. Cone*, 40 Barb., 220, affirmed by Court of Appeals, 41 N. Y., 216 *a*. Only liens are preserved. (Bump on Bank., 586 [8th ed.].) When a judgment is not a lien by State law, it is not so treated by Bankrupt Act. (*In re McIntosh*, 2 N. B. R., 506; *In re Cozart*, 3 id., 508.) And this lien must attach

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before proceeding in bankruptcy. (1 N. B. R., 199-599 ; 2 id., 388 ; 1 id., 165 ; 1 id., 190.) The defendants had constructive notice of the bankrupt proceeding. (*Perley v. Dole*, 38 Me., 558 ; *Oakey v. Corry*, 10 La. An., 502 ; *In re Lake*, 6 N. B. R., 542 ; *In re Gregg*, 3 id., 529 ; *Ex parte Vogel*, 2 id., 428 ; *In re Wynne*, 4 id., 23.) The plaintiffs can recover of defendants the amount due by them to Yerkes, disregarding the proceedings in Bouvier suit. (*Stevens v. Mechanics' Savings Bank*, 101 Mass., 109 ; *Mays v. Man. Nat. Bank*, 64 Penn. St., 74, 4 N. B. R., 446 ; Bankrupt Act of 1867, Secs. 14, 15, and 16 ; *Miller v. O'Brien*, 9 N. B. R., 26 ; *In re Grinnell*, 9 id., 29 ; *In re Hall*, 2 id., 192.) The plaintiffs, as assignees, succeed to the rights of creditors, as well as the rights of the bankrupt, and may contest the validity of a payment, although the bankrupt could not. (*In re Metzger*, 2 N. B. R., 355 ; *Foster v. Hackley*, 2 id., 406 ; *Bradshaw v. Klein*, 1 id., 542.) Congress has the power to divest the lien by attachment. (Bump on Bank. [8th ed.], 495, and cases cited ; *In re Brand*, 3 N. B. R., 324 ; *In re Williams*, 2 id., 83 ; *In re Ellis*, 1 id., 555 ; *Corner v. Miller*, id., 403.)

R. A. Wight, for the respondents.

DAVIS, P. J.—On the trial the court below found the following facts and conclusion of law :

“1. I find that on the 18th day of October, 1871, one John V. Bouvier commenced an action against Charles T. Yerkes, and on that day attachment was issued in said action, which was served on the defendants, who were then owing Yerkes the sum of five hundred and sixty-six dollars and ninety-six cents.

“2. I find that on the 10th day of November, 1871, a petition in bankruptcy was filed by a creditor of Yerkes in the United States Court for the Eastern District of Pennsylvania against Yerkes, and such proceedings were had that, on the 13th day of December, 1871, Yerkes was duly adjudicated a bankrupt.

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"3. That on the 30th day of December, 1871, Bouvier recovered a judgment in his action against Yerkes.

"4. That on the 5th day of January, 1872, a warrant in bankruptcy was issued out of said court to the marshal of that court, to which the marshal made his return, which appears in evidence.

"5. That on the 23d of January, 1872, the plaintiffs were appointed assignees in bankruptcy of all the estate and effects of Yerkes by the same court, and on the 24th of January, 1872, the register in bankruptcy executed to the plaintiffs an assignment to them of all the property, effects, etc., of said Yerkes, which he had on the 10th day of November, 1871.

"6. That the marshal published the warrant and notices relating to same, as appears by his return.

"7. That the plaintiffs published, as required by law, the usual notices of their appointment in four newspapers, three of which were published in Philadelphia and one in New York City, once a week for five weeks.

"8. That all the proceedings in bankruptcy were regular, and the usual notice in such proceedings were served and published as required by that act.

"9. That on the 3d of January, 1872, the defendants paid to the sheriff of the city of New York the sum owing by them to Yerkes, to wit five hundred and sixty-six dollars and ninety-six cents, who then held an execution on said judgment in favor of Bouvier, issued to him on the said 30th day of December, 1871.

"10. That the defendants had no knowledge of the bankruptcy proceedings against Yerkes until after the payment to the sheriff of the balance in their hands.

"As conclusion of law, I find that the defendants are entitled to judgment, with costs."

The only question in this case is as to the correctness of the conclusion of law that follows upon the findings. We think the case is controlled by *Miller v. Bowles* (10 N. B. R., 515; 58 N. Y., 263), where it was held that an assignment to an assignee, duly appointed in proceedings under the Bankrupt Act, dissolves the

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lien of an attachment sued out of a State Court, levied upon the property of the bankrupt within four months of the commencement of such proceedings. In accordance with that case, judgment should have been ordered, upon the facts found by the court in this case, in favor of the plaintiff. There is no controversy as to the facts in the case, and no necessity for a new trial. The judgment must, therefore, be reversed, and judgment directed for the plaintiff for the sum of five hundred and fifty-six dollars and ninety-six cents, with costs of the court below and of this appeal, to be adjusted.

BRADY and DANIELS, JJ., concurred.

SUPREME COURT—PENNSYLVANIA.

JUNE 11, 1877.

A voluntary assignee is a mere representative of his assignor, and takes his choses in action subject to any existing right of set-off.

Where a bank has made a voluntary assignment for the benefit of creditors, a depositor may set off a balance of deposits due him against his note held by the bank at the time of the assignment.

CITY BANK OF HARRISBURG v. SHERLOCK.

ERROR to the Court of Common Pleas of Dauphin County.

AGNEW, C. J.—In *re* Fulton's Estate, 1 P. F. Smith, 204, it is said: "Perhaps nothing is better settled in this State, by uniform and numerous decisions, than this, that a voluntary assignee is a mere representative of the debtor, enjoying his rights only, and no other, and is bound where he would be bound; that he is not the representative of the creditors, and is not clothed with their powers; that he is but a volunteer, and not a *bona fide* purchaser for value." Many cases are cited for these propositions. Martin Sherlock made his note for three hundred and fifty dollars, June 13, 1876, at ninety days, which the City Bank discounted, and held on and before

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the maturity of the note. He had a running account of deposits in the bank before and during the running of the note, on which there was a balance due him, September 6, 1876, of three hundred and ninety-five dollars and fifty cents, the bank then being the holder of the note. The bank made a voluntary assignment for the benefit of creditors, on the 7th of September, 1876. When the note passed by this assignment to the assignees, Sherlock was the creditor of the bank, and had an immediate right of action against it. The assignees being the mere representatives of the bank, and not purchasers for value, took the note subject to his right of set-off.

It is clear, according to authorities, that the bank conferred upon the voluntary assignees no right greater than their own, which was a right of action when the note fell due, subject to the existing set-off. *Bosler v. The Exchange Bank* (4 Barr., 32) was decided on a widely different principle. When Bosler died, the bank had no debt due for which it could sue; while Bosler's right of action was perfect before his death. But at the moment of his death the law took possession of his estate for the benefit of his creditors, he being insolvent. It was not the case of a mere voluntary transfer, but new rights sprang into being on the instant of his death. At his death the debts did not *ipso facto* cancel each other, for the reason that the bank had no immediate right of action. Consequently, when the estate, by operation, passed into legal administration, and was *in gremio legis*, the rights of creditors immediately attached, and, the estate being insolvent, equity demanded equality among the creditors of the same class. Hence the right of the bank as a creditor was to *pro rata* only. But a voluntary assignment has no such effect. It does not alter the status of the rights of the creditors as death does of the decedent's estate. It is true the duties and obligations of the assignees are regulated by law, but the transmission of the estate to them is the merely voluntary act of the debtor, who cannot impair the rights of creditors which had attached before his act. We discover no error in the record, and the judgment is affirmed.

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UNITED STATES SUPREME COURT.

OCTOBER TERM, 1876.

Where one of the members of a firm, which is doing a very large but failing business on a limited capital, withdraws over one-third of his share of the capital to build upon property which he conveys to his wife, but which appears upon the firm books as an investment of the firm until charged up to him after an assignment by such firm prior to an adjudication in involuntary bankruptcy, *Held*, that such conveyance to the wife is void, and that the assignee in bankruptcy is entitled to the proceeds of the property as against a joint creditor who has taken a mortgage thereon as security for his debt.

A judgment *in personam* cannot be taken against the wife of a bankrupt, or her executors, for the value of real or personal property conveyed to her in fraud of creditors.

JOHN L. PHIPPS et al., appellants, v. JOHN SEDGWICK, Assignee, &c., of JAMES K. PLACE, and JAMES D. SPARKMAN.

BARKER PLACE, et al., Executors, &c., of SUSAN A. PLACE appellants, v. JOHN SEDGWICK, Assignee, &c.

APPEALS from the Circuit Court of the United States for the Southern District of New York.

W. M. Evarts, for Phipps & Co.

J. K. Hayward, for Mrs. Place's executors.

F. N. Bangs, for John Sedgwick, assignee.

MILLER, J.—These are appeals presented by two different parties against whom decrees were obtained in the Circuit Court by the appellee, Sedgwick, who sued as assignee in bankruptcy of James K. Place and James D. Sparkman, doing business in the City of New York, as partners, under the style of James K. Place & Co.

The controversy in the District Court, where it was commenced, and in the Circuit Court, where it was heard on appeal, turned mainly on questions of fact, to be determined

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by the weight of evidence, and the most important part of it does so here. The evidence is voluminous and complicated, the record amounting to over eight hundred pages of printed matter. It cannot be expected that in delivering our judgment we should sustain it by any minute analysis of this testimony. We can profitably do no more than state the propositions in controversy and the results of our inquiry upon them.

Place and Sparkman succeeding to the business of J. K. & E. B. Place as wholesale grocers, commenced business as partners on the 1st December, 1865, and so continued until December 23, 1867. Their operations amounted to several millions of dollars. On the day last mentioned, finding themselves insolvent, they made a general assignment to Lewis W. Burritt and Thomas T. Sheffield, and on the 27th day of February, 1868, they filed a petition in bankruptcy, under which the appellee, Sedgwick, was appointed assignee.

Some time after this the assignee brought his bill in Chancery in the District Court for the Southern District of New York, where the bankruptcy proceedings were pending against the two bankrupts and sundry other persons supposed to have money or property which ought to come to the assignee, or to have liens or other claims on such property. A decree was rendered in the District Court which settled finally much that was in controversy, but in reference to two important matters appeals were taken to the Circuit Court, and it is in regard to the same matters that the two appeals now before us are taken.

The first of these, involved in case No. 100, grows out of the allegation in the bill that certain real estate, which we shall call Fifth avenue property (and which was sold under order of the Court pending the suit and the proceeds paid into Court), was, in law and equity, the property of the bankrupts, and that the proceeds should go to the assignee to be administered as part of the assets of the bankrupt firm. The appellees, John L. Phipps & Co., asserted a claim to this property and these proceeds, which we will presently consider. The District Court decided that the Fifth avenue property was but

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a fair and reasonable settlement of James K. Place upon his wife, which was not fraudulent as to his creditors, and ordered the proceeds of the sale to be paid to Phipps & Co., who asserted rights under Mrs. Place. On appeal the Circuit Court reversed this decree, and held that the settlement was fraudulent as to creditors, and ordered the proceeds of the sale, amounting to \$93,161.42, to be paid to the assignee. From this branch of the decree Phipps & Co. appeal to this Court.

The other branch of the case relates to what we shall call the Forty-third street lots.

A similar allegation is made in the bill as regards these lots, which, having been conveyed to Mrs. Place, and by her to other parties, and several exchanges and purchases and sales made by her, the assignee claims to have identified the property until the last sale, for which it is alleged that she received \$16,000, and for this sum the assignee recovered a decree against the executors of Mrs. Place, who died pending the suit. This decree of the District Court was affirmed in the Circuit Court, and from it the executors appeal to this Court, which constitutes case No. 101.

1. As regards the Fifth avenue property, it may be as well to state the relation to it of Phipps & Co., the appellants. It appears that they were largely creditors of J. K. Place & Co. at the time of their failure, and in endeavoring to secure payment of their debt after the assignment of that firm, a mortgage was given by Mrs. Place on the Fifth avenue property to secure the sum of \$50,000. Mr. Place joined in this mortgage. On the very day of the application of Place & Co. to be declared bankrupts, a personal judgment was obtained against them on the debt of Phipps & Co. It seems to be clear that the mortgage was taken under such circumstances of notice of the nature of Mrs. Place's title on the part of Phipps & Co., that their claim under that mortgage is no better than the title of Mrs. Place. The whole matter, therefore, turns upon the question of the validity of the conveyance to her as a fair and honest provision made by a husband engaged in business by

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appropriating a part of the means embarked in that business to that purpose; for it is not denied that the entire sum which went to purchasing the ground lease, building the house and furnishing it, amounting to more than \$100,000, was paid out of the moneys of the firm of J. K. Place & Co.

The evidence affecting the validity of this settlement is voluminous, consisting of an examination of the books of account of the insolvent firm, the testimony of Mr. Place and many other witnesses, accompanied with deeds, assignments, and other papers in writing. We cannot go all over this, and concurring as we do with the opinion of the Circuit Court, it is unnecessary. A few observations must suffice.

The basis on which the honesty and fairness of the settlement is supported in argument is that on the first day of December, 1865, the day on which the old partnership of J. K. Place and E. B. Place was superseded by the firm of J. K. Place & Co., composed of J. K. Place and Sparkman, Mr. Place was worth two hundred and twenty-seven thousand dollars. This estimate resulted from the balance-sheet of the old firm, and that sum constituted the capital which he put into the new firm. It was in the month of September previous to this that he bought the ground lease of the lots in question, taking the assignment to himself, and between that time and the first of December he entered into contracts for the erection of a building on the lots, which were supposed to amount to fifty or sixty thousand dollars, but which in the end came to about ninety thousand dollars.

There is some question whether the assignment of the lease of these lots to his wife was made on the first day of December, when it bears date, or on the first day of next April, when it was acknowledged or recorded, with a preponderance of evidence, as we think, in favor of the latter. But upon the supposition that Mr. Place was, on the first day of December, fairly entitled to consider his interest in the business as worth two hundred and twenty-seven thousand dollars, was it good faith to his creditors to withdraw about one-third of that capital and invest it in his wife's name, so that it was placed

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beyond the reach of his creditors, and made to constitute a luxurious home for himself? If the business which the partnership was doing was a small and a safe business, and the shape in which this sum of two hundred and twenty-seven thousand dollars stood was such as made it unquestionable as representing so much money, while the withdrawal of ninety thousand dollars, if otherwise fair, might be sustained, would still be of doubtful validity as against creditors.

But there are other and controlling circumstances in this case which we will refer to :

1. The business of the partnership was not a small one. On the contrary, it was very large, and must have amounted to several millions per annum. The very balance sheet on which the transaction is defended showed that the debts of the firm at that date were near four million dollars, and the credit side consisted in goods on hand and debts due the firm. Of course the real value of this balance was conjectural and uncertain.

2. The proportion of this balance was not more than ten per cent. of the debts of the firm, a very small capital for such a large business, and it was unfair to the creditors to withdraw one-third of that.

3. There is strong reason to believe that other liabilities of Mr. Place in other ventures, and in regard to his purchase of his brother's interest in the old firm, when fairly taken into the account and charged against this balance, would have reduced it very considerably. How much, cannot be precisely ascertained.

4. But though Mr. Place had given his obligations to pay what amounted to ninety thousand dollars on the house building, that was his personal obligation, and at its date was not a debt of the firm. If he afterward took the money of the firm to pay those individual debts, at a time when the business of the firm could not stand it, the transaction must be treated as of the date when the money was so withdrawn, and its honesty tested by the condition of the business at that time. The books of the firm show that there was paid on this

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account up to December 31, 1866, or within one year and one month after the new firm began, eighty-two thousand dollars, including that paid before, and in the first three months of the next year, thirteen thousand dollars. These same books show that during this time the condition of the partnership had changed largely for the worse, independently of these outlays. The losses on the rapid decline of gold which affected the value of their goods, and the amounts lost on the gold which they carried, was estimated at one hundred and fifty thousand dollars for the first year. Losses in two collateral concerns in which one or both of the partners were interested also became apparent, so that before the end of the first year any prudent man must have seen that in withdrawing so much cash from his business he was choosing between the danger of the bankruptcy of his firm on one side, and a luxurious home for himself and wife on the other.

5. Mr. Place had agreed with his partner, Sparkman, to put into the business six hundred thousand dollars of capital, to two hundred thousand dollars by Sparkman. This was a moneyed obligation which he was bound to perform, but which he never did perform, and instead of enlarging the nominal capital of two hundred and twenty-seven thousand dollars, we have shown that he took over one hundred thousand dollars from it for this house.

6. The books of the firm were kept in a manner which on inspection would show that the Fifth avenue property was an investment which belonged to the firm, and should be counted as part of its assets; and this remained the condition of the books until after the assignment, when the book-keeper charged the whole up to Mr. Place, and thus by a stroke of the pen after insolvency, and after the assignment, one hundred thousand dollars which had appeared as property of the firm, became nothing but the debt of an insolvent partner of that firm.

For these reasons we think the decree of the Circuit Court, that the assignee was entitled to the proceeds of this property after paying a mortgage admitted to be a just claim, is right.

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In reference to the decree for the payment of money against the executors of Mrs. Place on account of the Forty-third street lots, we are of a different opinion.

The lots in which the money of the firm was first invested, and which was the beginning of this separate real estate transaction, are estimated by the master at the value of four thousand dollars. By subsequent exchanges or sales the fund is traced to another piece of real estate which is supposed to be worth sixteen thousand dollars, for which sum, with interest, a judgment is rendered against Mrs. Place.

But we are of opinion that Mrs. Place, if living, could not be subjected to such a decree if all that is said be true, nor can her executors be now.

While the books of reports are full of cases in which the real or personal property conveyed to the wife in fraud of the husband's creditors has been pursued, and when identified in her hands, or in the hands of voluntary grantees or purchasers with notice, we are not aware of any well-considered case of authority where the pursuit of the property has been abandoned and a judgment *in personam* for its value taken against the wife.

Certainly no such doctrine is sanctioned by the common law, and though the present suit is a bill in chancery, the decree in this case is nothing more than a judgment at law and could as well have been maintained in a separate suit at law for the money as in this suit. And the liability of the executors of the wife to this personal judgment must depend on the same principle as if abandoning the pursuit of the *res* the assignee had brought an action at law for the money.

The statutes of the different States have gone very far in this country to modify the peculiar relations of husband and wife, as they existed at common law, in reference to their property. But they have not, except perhaps in Louisiana, gone so far as to recognize the civil law rule of perfect independence in dealing with each other. While the statutes of New York have recognized certain rights of the wife to deal with and contract in reference to her separate property, they

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fall far short of establishing the principle that out of that separate property she can be made liable for money or property received at her husband's hands which, in equity, ought to have gone to pay his debts. Equity has been ready, where such property remains in her hands, to restore it to its proper use, but not to hold her separate estate liable for what she has received and probably spent at his dictation. Such a proposition would be a very unjust one to the wife still under the dominion, control and personal influence of the husband. In receiving favors at his hands, which she supposed to be offerings of affection or proper provision for her comfort, she would be subjecting that which was her own, or which might afterwards come to her from other sources, to unknown and unsuspected charges, of the amount and nature of which she would be wholly ignorant. It answers the demands of justice in such cases if the creditor, finding the property itself in her hands or in the hands of one holding it with notice, appropriates it to pay his debt. But if it is beyond his reach, the wife should no more be made liable for it than if the husband himself had spent it in support of his family, or even of his own extravagance.

For these reasons, we are of opinion that so much of the decree of the Circuit Court as directs the payment of the proceeds of the Fifth avenue property to Sedgwick, the assignee, must be affirmed, but without prejudice to the right of the holder of Phipps & Co.'s debt to present it for allowance as a claim against the bankrupt's assets, in regard to which we decide nothing. The decree against the executors of Mrs. Place is reversed. In all other respects the decree of the Circuit Court is affirmed, and the cause remanded for further proceedings in conformity to this opinion.

Baschore et al., v. Rhoads et al.

SUPREME COURT—PENNSYLVANIA.

JUNE 25, 1877.

Under the laws of Pennsylvania, the assignee of an insolvent bank cannot accept in payment of debts due the bank a protested draft drawn by such bank upon another bank, and sold by the payee to the debtor.

BASCHORE et al. v. RHOADS et al., Assignees of Farmers and Mechanics' Bank.

ERROR to Court of Common Pleas of Franklin county.

Bill for an injunction to restrain the assignees of the bank, who hold a judgment against the plaintiff in the Court of Common Pleas of Franklin county for \$2,607.72, ripe for execution, from proceeding to collect the same, for the reason that they are bound by law to receive in payment of debts due to the bank its own notes and obligations, and the plaintiff has tendered to them in payment of said judgment or record debt a certain draft, drawn by the Farmers and Mechanics' Bank of Shippensburg upon the Union Banking Company of Philadelphia, in favor of the First National Bank of Shippensburg, dated April 1, 1875, for \$2,620.94, assigned to the plaintiff on the 25th of October, 1876.

In the court below the injunction was refused, the preliminary injunction dissolved, and the bill dismissed at the costs of plaintiff.

Messrs. *Kennedy & Stewart*, for appellants.

F. M. Kimmel, Esq., and Messrs. *Brewer & Gehr*, for appellees.

AGNEW, J.—The plaintiffs in this bill claim to pay a judgment in favor of the Farmers and Mechanics' Bank upon a note in the hands of the assignees of that bank, with a protested draft drawn by the bank in favor of the First National Bank of Shippensburg upon the Union Banking Co. of Philadelphia and by the National Bank of Shippensburg sold to the plaintiffs after the judgment had been obtained by the assignees

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upon the note against the plaintiffs. Their claim to pay the judgment with the draft is founded on the proviso in the 27th section of the General Banking Act of April 16, 1850, 1 Brightly, 144, pl. 101. The proviso is in these words: "Provided, however, that the said assignees shall receive in payment of debts due to said bank its own notes and obligations and the checks of its depositors at par."

Is the draft before mentioned an obligation within the meaning of this proviso? This is the question presented. That it is not is clearly seen by a comparison of several sections of the Act of 1850. In the first place, it is to be noticed that the 27th section, containing this proviso, is that which prescribes the proceeding taken to enforce the forfeiture of the charter of a bank, upon its refusal to pay its notes, obligations and certificates of deposit in specie. The provisions as to this refusal to redeem in gold or silver coin are found in the three preceding sections—the 24th, 25th and 26th. The debts thus refused to be redeemed in coin are described in the 25th section, viz., "any bill, note or obligation issued by such bank," and "any moneys received in such bank on deposit." The section then allows twelve per cent. interest, and requires the bills, obligations or certificates to be endorsed by the cashier, setting forth the demand of coin and the time it was made. The history of this provision in the legislation of the State shows that it is intended to compel specie payment of those bills and notes which constitute the circulation of the bank.

But we need not resort to the history of such legislation, for the 14th clause of the 10th section of the Act of 1850 is the best interpreter of its meaning. Turning to that clause we find that it provides for two distinct kinds of bills or notes which are to constitute its circulating obligations. This clause enacts that "bills, obligatory and of credit, under the seal of such corporations, which shall be made to any person or persons, shall be assignable by endorsement thereupon, under the hand or hands of such person or persons, and of his, her or their assignee or assignees, so as to absolutely transfer and invest the property and legal title thereof in each and every assignee or assignees suc-

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cessively, and enable such assignee or assignees to bring and maintain an action thereupon in his, her or their own name or names; and bills or notes which may be issued by order of any of the said corporations, signed by the president and countersigned by the cashier thereof, promising payment of money to any person or persons, his, her or their order, or to bearer, though not under seal of such corporation, shall be binding and obligatory upon the same in like manner and with like force and effect as upon any private person or persons, if issued by him or them in his, her or their private capacity or capacities, and shall be assignable and negotiable in like manner as if they were issued by such private person or persons," etc. These are the liabilities for which provision, in subsequent sections, is made for their redemption in coin. It is evident that drafts or orders drawn on others are not bills obligatory, or notes such as are mentioned in the 14th clause of the 10th section. This is made more plain by a reference to the sections providing for specie payment. The 24th section requires redemption of the notes of the bank in coin, and declares a forfeiture of the charter as a consequence of a failure to do so on demand. The 25th describes the mode of making demand, and prescribes the duty of the cashier to make endorsement of the time of demand, and declares the consequence as a liability to pay twelve per cent. interest. The language of this section is precisely descriptive of the bills and notes mentioned in the 14th clause of the 10th section, thus, "and if any of the said banks shall at any time refuse or neglect to pay on demand, in gold or silver, any bill, note or obligation issued by such banks, according to the contract, promise or undertaking therein expressed," etc.

These provisions indicate clearly the reason for the proviso in the 27th section, that the assignees shall receive in payment of the debts due to the bank its own notes, obligations and the checks of depositors at par. In the 25th section deposits are also required to be paid in coin, and by the 39th section are placed in the second class for distribution of the assets of the bank. When we reach the 39th section the intention of the act becomes manifest. It declares for the purposes of distribution

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that the debts of the banks shall be divided into three classes: 1st. Notes; which includes both kinds, of bills or obligations under seal, and notes not under seal. 2d. Deposits. 3d. All other debts, except the stock of the bank. Thus it becomes clear that the obligations and notes required by the 27th section to be received in payment at par are those contained in the first class; it being the policy of the State to secure payment of the circulation of the bank, and thus to protect her citizens against failures. This renders it certain that drafts, orders, contracts, and other debts, not falling within the description of the bills obligatory and notes mentioned in the 14th clause of the 10th section, must take their place in the third class, and consequently are not to be accepted by the assignees in payment of debts at par. If they were, the course of distribution intended by the Legislature would fail entirely, for any one might purchase the drafts or orders of a broken bank at any discount, and tender them in payment to the assignees. This is not the true interpretation of the law.

The decree of the Court of Common Pleas is affirmed, and the appellants are ordered to pay the costs, and the appeal is dismissed.

UNITED STATES CIRCUIT COURT—E. D. PENNSYLVANIA.

MARCH 27, 1877.

Where one of the members of an insolvent firm, with knowledge of such insolvency, carries a message at the request of a creditor, although unwillingly, to an attorney directing him to enter up judgment upon a judgment note which the firm had previously given, *Held*, that he thereby procured the entry of such judgment and the issuing of the execution thereon.

In re A. BENTON & BRO.

PETITION of creditors for adjudication of debtors as bankrupts.

The testimony disclosed the following facts:—

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In June, 1876, the firm of A. Benton & Bro., becoming embarrassed, borrowed from certain creditors eleven thousand dollars for business purposes, giving therefor a judgment note, which was duly entered of record. The money was made payable in instalments. On July 15, 1876, a joint judgment note for twenty thousand dollars was executed by the Benton Bros. to Judge Waller and Mrs. Elizabeth J. Benton, the wife of one of the parties, for money alleged to be due to them. This note was left by the firm in the hands of Col. Moyer, their counsel, and he being, at the same time, a friend of Judge Waller, the latter requested him to keep it in his fire-proof safe until wanted. On January 25, 1877, the instalments on the eleven thousand dollar judgment not being paid, the plaintiffs therein called a meeting at the office of their attorney, Mr. Burton. At this meeting the Benton Brothers, Col. Moyer, the eleven thousand dollar judgment creditors, and their counsel were present. The meeting adjourned with the understanding that nothing should be done for forty-eight hours, when a statement of the Benton Brothers' real and personal estate would be furnished. After the meeting, Charles Benton repaired to Mrs. Benton's house and asked her to loan the firm some money. This, as she afterwards testified, alarmed her, and she not only refused the request but directed Charles Benton to go to Col. Moyer and tell him to enter up the judgment and issue execution. Charles Benton remonstrated, saying "it would ruin them." He, however, immediately went to Col. Moyer's office and communicated to him Mrs. Benton's message. Col. Moyer, after endorsing the judgment note for twenty thousand dollars, handed it to another attorney to enter up. Execution was placed in the sheriff's hand at 2.38 P.M. Later, on the same day, Col. Moyer called on Mrs. Benton, explained that as he could not act in the matter he had placed the note in the hands of another attorney, and suggested that Mrs. Benton write a letter to the other attorney, authorizing him to enter up the judgment note and issue execution thereon, which Mrs. Benton accordingly did. On the next day, the 26th of January, B. F. Fisher, Esq., received by tele-

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gram instructions from Judge Waller to proceed on his behalf on the same judgment note. On January 31, 1877, a number of the unsecured creditors of A. Benton & Bro. filed this petition in bankruptcy.

Frank P. Prichard and *G. C. Purves*, for petitioning creditors, argued that the facts showed a procurement, by the alleged bankrupts, of the entry of judgment and the execution thereon.

J. M. Moyer, for bankrupts. There was no intention on the part of the Benton Bros. to give preference. Charles Benton went to Mrs. Benton to get additional money and not to procure execution to be issued. The direction to enter judgment and issue execution came from her without any suggestion from the debtors, and in fact they remonstrated against it. That she was the wife of one of the parties is immaterial. She may be a creditor. The question of procurement is one of intention, and the evidence shows no intention on the part of the Benton Bro. to procure this execution to be issued.

CADWALADER, J.—To understand the question in this case, it is necessary to ascertain the relations of Mr. Moyer on the 25th of January, 1877. He was, in a general sense, the professional agent, counsel, or attorney of the alleged bankrupts. His peculiar relation to Judge Waller merely required him to hold the judgment note or bond of 15th July, 1876, until instructions from that gentleman. No instructions by Judge Waller to Mr. Moyer, or to any one else, were given until the next day, the 26th. The execution in question under the judgment upon that note or bond was delivered to the sheriff on the afternoon of the 25th. The question is whether the debtors, or either of them, procured, directly or indirectly, the entry of the judgment and issuing of the execution. The occurrences of the 25th were in three successive stages: first, the meeting at Burton's office; secondly, the communications with Mrs. Benton, and the consequent instructions from her to Mr. Moyer; thirdly, the subsequent acts of the parties. The

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occurrences at Mr. Burton's ought to have apprised Charles Benton, one of the alleged bankrupts, that their ruin was inevitable, and could not be postponed. With a knowledge, as he states, that trouble was coming, he repaired to Mrs. Benton's and asked her for more money. This naturally alarmed her; and according to the evidence she thereupon sent a message by Charles Benton to Mr. Moyer, in form or substance directing him to proceed immediately to enter the judgment and issue execution. Charles Benton remonstrated earnestly, saying that it would ruin them, etc. Nevertheless he accepted the mission to Mr. Moyer, and communicated to him the lady's direction. Mr. Moyer substituted for himself another attorney for the purpose. By the latter gentleman the judgment was at once entered, and an execution thereon was placed in the sheriff's hands. A written direction to the substituted attorney was obtained from her, and Mr. Moyer explained to her his reasons for advising such a course of procedure. All this occurred in the afternoon of the 25th. The execution is inscribed by the sheriff as received in his office at 2.38 o'clock P.M. Mr. Moyer did not see her until a later hour. On the next day another gentleman of the bar received instructions from Judge Waller authorizing proceedings of a like character on his behalf under the same judgment note, or bond. He was from thenceforth a participant in them. Whether, until then, the sheriff could have levied more than Mrs. Benton's portion of the debt, is a question which it is unnecessary to consider now. The proceedings had been consummated, so far as Mrs. Benton's demand was concerned, on the previous day.

I am of opinion that the occurrences of that day involved a procurement, by Charles Benton, of the issuing of the execution. This was the tendency and effect of what he did; and beyond this we are not to inquire as to his intentions.

The debtors are adjudged bankrupts.

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NEW YORK SUPREME COURT—FIRST DEPARTMENT.

MARCH, 1877.

Under the Amending Act of June 22, 1874, the Federal Courts have exclusive jurisdiction over actions brought by assignees to recover property claimed to have been transferred by a bankrupt in violation of Sec. 5128, where the value of such property exceeds five hundred dollars.

By the Act of June 22, 1874, the State Courts were ousted of their jurisdiction over such actions pending before them at the time of its passage.

GEORGE M. OLCOTT, Assignee, v. JOHN MACLEAN et al.

APPEAL from a judgment in favor of the plaintiff recovered on the verdict of a jury for one thousand three hundred and twenty dollars and sixty-three cents, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

George A. Blake, for the appellants.

By the enactment of the Revised Statutes of the United States on June 22, 1874, the jurisdiction of the United States Courts became "exclusive" over actions of this character. (R. S. of U. S., Sec. 711, subd. 6, p. 134; Sec. 4972, p. 969; Act of Congress, 1874, Chap. 390, Sec. 2.) The pendency of this action at the time the Act of June 22, 1874, was passed, is no reason to except it. (*Butler v. Palmer*, 1 Hill, 324; *Matter of Palmer*, 40 N. Y., 561; *Frost v. Hotchkiss*, 14 N. B. R., 443, 1 Abb. New Cas., 27.) The cases in which the courts of this State have considered the effect of the "exclusive jurisdiction" granted to the United States Courts by act of Congress are not very numerous. They are, as to consuls, *Davis v. Packard*, 6 Wend., 327; *Davis v. Packard*, 10 id., 50; *Davis v. Packard*, 6 Peters, 41; *Davis v. Packard*, 7 id., 276; *Davis v. Packard*, 8 id., 312; *Vularino v. Thompson*, 7 N. Y., 576. As to States, *Delafield v. State of Illinois*, 26 Wend., 191; 2 Hill, 159. As to postmasters, *Teal v. Felton*,

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1 N. Y., 537; 12 How., 284. As to admiralty, *In re Josephine*, 39 N. Y., 19; *Brookman v. Hamill*, 43 id., 554; *Brookman v. Hamill*, 46 id., 636; *Vose v. Cockcroft*, 44 id., 415. As to infringement of patents, *Dudley v. Mayhew*, 3 N. Y., 9. As to pilotage, *Cisco v. Roberts*, 36 N. Y., 292; *Com. of Pilots v. Pacific M. S. S. Co.*, 52 id., 609; *Henderson v. Spofford*, 59 id., 131. In all these cases the power of Congress to create the remedy or right and confine its exercise to its own courts is recognized. (*Lathrop, Assignee, v. Drake*, 13 N. B. R., 473.) Having no jurisdiction, the judgment must be reversed absolutely, and with costs. (*Ayers v. West. R. R. Co.*, 45 N. Y., 260; 49 id., 660; *McMahon v. Mut. Benefit Ins. Co.*, 3 Bosw., 644.)

William P. Chambers, for the respondent.

DANIELS, J.—The verdict in this case was rendered for the value of certain goods received by the defendants from James S. Aspinwall. The same goods had been sold by the defendants and shipped by them, at London, to him in New York. The shipment was made on the last day of October, 1872, and he received the goods in November following. The 5th or 6th of December, 1872, he suspended payment, and did not afterwards resume. He was insolvent at that time, and on the 27th day of January, 1873, petitioned for the benefit of the Bankrupt Law. Before doing that, and on the tenth day of the month preceding, he delivered to the defendant's agent, at New York, an instrument in writing, by which he stated that he held part of the goods in store for account of the defendants. And on the 7th day of January, 1873, in compliance with orders drawn upon him by the defendant's agent, he delivered to such agent those goods and others shipped with them by the defendants. The plaintiff was appointed assignee in the bankruptcy proceedings on the 25th of February, 1873. And after demanding these goods from the defendants, he commenced this action for the recovery of their value. An attachment was issued and the property attached under it.

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The defendants thereupon appeared by attorney in the action. It is not necessary to examine into the merits of the objection urged, that the attachment was an irregular proceeding, for that point cannot properly be made in the present state of this action. The appearance itself gave the court jurisdiction over the persons of the defendants, and it is too late now to object that it was irregularly secured. (*Brown v. Nichols*, 42 N. Y., 26.)

When the goods were received by Aspinwall, as they appear to have been in November, he became their absolute owner. His title was complete, and nothing was done by him to divest it until after he had become insolvent and suspended payment. For that reason it was insisted by the plaintiff that the return of the goods to the defendants' agent was in fraud of the Bankrupt Act, and entitled him to a recovery of their value as the assignee. Their value was shown to have exceeded the sum of one thousand three hundred dollars, and, for that reason, it was objected that the change made in the law in 1874 deprived this court of jurisdiction over the controversy. When it was commenced in 1873, it was settled by authority that this court had jurisdiction over such an action brought by an assignee in bankruptcy. (*Cook v. Whipple*, 55 N. Y., 150.) But during its pendency, and before the trial, the law defining the powers of the United States District Courts over the collection of the assets of the bankrupt was amended by the addition of the proviso: "That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides, having jurisdiction of claims of such nature and amount." (Laws of 1874, 178, Sec. 2.)

The cause of action relied upon for a recovery in this case arose out of an alleged violation of the provision of the Bankrupt Law, declaring, as it had been amended, "that if any person, being insolvent or in contemplation of insolvency, within four months before the filing of the petition by or against

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him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him; procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and knowing that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited." (U. S. Revised Statutes, 996, Sec. 5128 ; Laws of Cong. of 1874, p. 180, Sec. 11, subd. 1.)

It was literally, therefore, a case arising under the law of the United States that this action was brought upon ; and for that reason the exclusive jurisdiction of the United States Courts could be constitutionally extended over it by Act of Congress. (U. S. Const., Art. 3, Sec. 2, subd. 1.) And it appears that it was the intention of the amendment enacted in 1874, and already mentioned, to accomplish that result ; for by providing that actions for the collection of debts, not exceeding in amount the sum of five hundred dollars, might be allowed to be prosecuted in courts of the State where the bankrupt resides, having jurisdiction of claims of such nature and amount, it was designed that it should be understood that the State Courts should be limited and restricted to that class of cases arising under the provisions of the Bankrupt Law. Enumerating the cases that might be prosecuted in such courts excluded all others not included by the import of the terms made use of. That is a well-settled rule of construction, and it has been long applied to the interpretation of statutory provisions. By the terms made use of, a negative is implied and understood beyond the power actually declared. As the section of the act has been amended, it now provides that the jurisdiction of the District Courts of the United States, as

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courts of bankruptcy, shall extend, among other enumerated cases, to those for the collection of all the assets of the bankrupt, except actions for the recovery of debts not exceeding five hundred dollars, which may be directed by the District Court to be collected in the courts of the State where the bankrupt resides, having jurisdiction of claims of that nature. (U. S. R. S., 969, First Session ; Laws of 1874, 178, Sec. 2.)

Beyond the limits of that exception, the jurisdiction of the District Courts has been made exclusive of the courts of the State. That is the import of the terms made use of, and it is also the effect of the construction placed upon such provisions of statutory law. (*Dudley v. Mayhew*, 3 Comst., 9.)

This change in the law deprived the State Courts of all other authority than that mentioned in it, over actions of this description, as soon as the provision went into effect, and that was long before this action was tried. There was nothing in the saving provisions of the Revised Statutes which prevented it from including pending actions. They simply restrained the effect of the repealing clauses contained in the revision then made. (U. S. R. S., 2, Sec. 13 ; *id.*, 1091, Sec. 5597.)

That is entirely evident from the last section of the statutes, for it declares that all acts passed since the 1st day of December, 1873, are to have full effect, as if they were passed after the enactment of the revision as subsequent statutes, and as repealing any portion of the revision inconsistent therewith. (*Id.*, 1092.) And the force of that general provision has not been restrained by anything contained in the preceding thirteenth section, for that simply saves the liability of the party and not the proceedings taken to enforce it ; besides, this is not the repeal of any existing law. It had not before been provided that the courts of the State should entertain jurisdiction over actions of this description ; but the exclusive power of the District Courts had not been so far extended as to deprive the State Courts of their powers in this respect, and for that reason it was held that actions of this description could be prosecuted before them. It was because Congress had not acted at all upon the subject that their jurisdiction remained

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unaffected. That omission was supplied by the amendment of 1874, and its effect was at once to abridge the powers of this court to such an extent as to deprive it of all authority over the present action from the time that amendment became operative as the law. The law in this respect is similar to a change considered by the court in *Insurance Company v. Ritchie* (5 Wall., 541), where an act passed in 1866 declared that a preceding act passed in 1833 should not apply to such a case. And the chief-justice, in his opinion upon the effect produced by the subsequent act, said: "This is equivalent to a repeal of an act giving jurisdiction of a pending suit. It is an express prohibition of the exercise of the jurisdiction conferred by the Act of 1833, in cases arising under the Internal Revenue Law. It is clear that when the jurisdiction of a cause depends upon a statute, the repeal of a statute takes away the jurisdiction. And it is equally clear that when a jurisdiction conferred by statute is prohibited by a subsequent statute, the prohibition is so far a repeal of the statute conferring the jurisdiction." (Id., 544.) The same principle was also maintained in the case of *The Assessor v. Osbornes* (9 id., 567). It was there held that the repeal of a statute withdrew the jurisdiction it conferred upon the courts; and where it contains no saving clause, "all pending actions fell, as the jurisdiction depended entirely upon the Acts of Congress." (Id., 575.) That was the effect of the amendment made in 1874. It withdrew from the courts of the State the authority over these cases, which had previously been maintained only because Congress had not directly or indirectly prohibited it, and confined the jurisdiction from that time to the District Courts, except when actions, by their permission, should be brought for the recovery of debts owing to the bankrupt, not exceeding in amount the sum of five hundred dollars. This was not a demand of that limited nature, and, consequently, not within even this exceptional authority.

As the power of this court to hear and determine this case has been withdrawn, it is unnecessary to examine any of the other objections to the recovery on the part of the defendants. They do not seem to be tenable, because all the property was

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neither transferred nor delivered by the bankrupt before the seventh day of January; but this further consideration should be dispensed with, because of the present want of power in the court to decide them in this case.

The judgment should be reversed and the complaint dismissed, but as that has become necessary because of the legislation which took effect during the pendency of the action, it should be without costs.

DAVIS, P. J., and BRADY, J., concurred.

SUPREME COURT—ILLINOIS.

SEPTEMBER, 1875.

A discharge in bankruptcy cannot be set up as a general defense to an action by a creditor to set aside a conveyance in fraud of creditors pending at the time of filing the petition, where such creditor has not proved his claim in the bankruptcy proceedings, and the assignee has not interfered in the cause in any way.

But the discharge may be set up in such action in bar of a personal judgment against the bankrupt other than the subjection of the property and claims reached by the creditor's bill to the satisfaction of the judgment.

A conveyance made in fraud of creditors is voidable and not void, and the property embraced in it does not absolutely vest in the assignee as a portion of the bankrupt's estate.

A cross-bill setting up defendant's discharge in bankruptcy is not defective in not making his assignee a party, where almost four years have elapsed since the appointment of the assignee, and he has made a final settlement and been discharged.

STEPHEN S. PHELPS et al. v. JOHN F. CURTS et al.

Stewart, Phelps & Stewart, Skinner & Marsh, and O. H. Browning, for the appellants.

C. M. Harris, for the appellees.

SHELDON, J.—This was a creditor's bill, brought by a certain judgment-creditor of S. S. Phelps & Co. against Stephen S. Phelps, William Phelps, and Myron Phelps, for the discovery of assets, and to subject certain property which had been conveyed by Stephen S. Phelps and Arthur S. Phelps,

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composing the firm of S. S. Phelps & Co., to the payment of the complainants' demands. A decree was rendered against the defendants in the court below, from which they appealed. Previous to August, 1861, S. S. Phelps & Co. had been largely engaged in the mercantile and banking business in Oquawka, in this State, and S. S. Phelps, individually and as a member of the firms of S. S. Phelps & Co. and Phelps & Rice, was at that date indebted to the amount of some one hundred and seventy-four thousand dollars, and he, and said firm of S. S. Phelps & Co., being pressed for payment of their indebtedness, and in failing circumstances, S. S. Phelps, about that time, by different conveyances, conveyed to his brother, William Phelps, large quantities of real estate, and made transfers to him of a large amount of notes and accounts, and other personal property. S. S. Phelps and Arthur Phelps conveyed some real estate in like manner.

These conveyances and transfers comprised, essentially, all of the property of S. S. Phelps.

Subsequently, William Phelps conveyed a portion of such real estate to another brother, Myron Phelps. The main object of the bill is to impeach these conveyances and transfers as being fraudulent as against creditors. In the respect that the decree finds the conveyances and transfers from S. S. Phelps, and from him and Arthur to William Phelps, to be fraudulent as against creditors, we are entirely satisfied with its correctness.

It appears that on the 21st of August, 1861, S. S. Phelps conveyed to William Phelps a large amount of real estate, for the expressed consideration of thirty-nine thousand seven hundred and eighty-seven dollars, for which the latter executed to the former his three promissory notes, for thirteen thousand two hundred and sixty-two dollars and twenty-three cents each, payable in four, five, and six years, with interest. The proofs abundantly show that this was but in form a sale; that it was in reality but a device to place the property in the hands of William beyond the reach of creditors, to prevent its appropriation by them in legal mode to the satisfaction of their debts against S. S. Phelps.

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The same may be said with respect to the other conveyances and transfers declared void by the decree.

The answers of the defendants were required to be under oath, and they fully deny, in their answers, all fraud or intention to defraud; and it is insisted that the answers must be taken as conclusive in this respect, there not being sufficient countervailing proof. There might have been no intention to actually defraud creditors, and the defendants might well have answered, under oath, as their conclusion, that there was no fraud, and yet there have been a legal fraud. We cannot think, from the evidence, that there was any actual defrauding of creditors intended, by depriving them of all benefits of the property, but that the purpose was to place it without the reach of creditors, to prevent its sacrifice for the payment of their claims by enforcement of legal remedies, and to await opportunities, as they might afterwards arise, for advantageously disposing of the property, and to apply the proceeds towards the satisfaction of such claims, the parties believing, perhaps, that the arrangement would be for the best interests of the creditors, as a whole. But the creditors were, by the conveyances, effectually hindered and delayed in the collection of their demands; they were prevented from resort to the property; the debtor deprived himself of all means for paying any of his indebtedness for at least four years, the length of time the shortest note had to run; an opportunity was secured to make use of the means to coerce creditors into compromises of their claims, and to constrain them to accept real estate in satisfaction of debts, at such prices as might be satisfactory to the debtor.

Whatever the real motives of the parties, such a disposition of a debtor's property is a legal fraud. (Bump, Fraud. Conv., 68, and cases cited in note.) A debtor, in failing circumstances, is only allowed to place his property beyond the reach of his creditors by making a general assignment of it, when he does so for the benefit of the creditors, by devoting it unreservedly to the payment of his debts, and not with a view to his advantage, in delaying until a favorable time the appropria-

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tion of the property for such purpose. (*Nesbitt et al. v. Digby et al.*, 13 Ill., 387.) In regard to the conveyances from William to Myron Phelps, it appears that the latter held two promissory notes executed to him by S. S. Phelps & Co., bearing date at St. Louis, Mo., April 1, 1858, one for twelve thousand dollars, payable one year after date, with interest at ten per cent. per annum after maturity, and the other for ten thousand dollars, payable two years after date, with interest at ten per cent. per annum after one year. That in August, 1871, on the application of William Phelps, and his representation that he wanted to get the notes to apply in part payment of property he was about purchasing from S. S. Phelps and S. S. Phelps & Co., Myron Phelps sold and assigned said notes to William Phelps, and took in payment therefor the note of the latter for the sum of twenty-five thousand, five hundred and ninety-four dollars and forty-three cents, that being the amount then due on the said notes of S. S. Phelps & Co.; that such note of William Phelps was to be paid in sums of five thousand dollars or more, yearly, as fast as he could realize it out of the property he was about to purchase of S. S. Phelps and S. S. Phelps & Co., the whole sum to be paid within five years from the date of the note, with the privilege of paying property, at cash value, if unable to realize money from the property; and that the conveyance in question, from William Phelps to Myron Phelps, of a large amount of the property which had been conveyed by S. S. Phelps to William Phelps, though absolute in form, was taken as security for the payment of said note of William Phelps, Myron Phelps making, at the same time, a verbal agreement to reconvey the property to William Phelps upon payment of the note. From time to time, afterwards, Myron Phelps, without receiving any consideration, executed conveyances of divers pieces of the property, as William Phelps found purchasers therefor.

The decree found these conveyances to Myron Phelps to be fraudulent, and declared them to be void as against the complainant. The propriety of this part of the decree, we think, must depend upon the question whether the two notes of S. S.

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Phelps & Co. to Myron Phelps, of April 1, 1858, were given for a *bona fide* indebtedness, and remained unpaid at the time of their transfer to William Phelps.

The answers show, and they are sustained in this respect by the evidence, that the notes were given for twenty thousand dollars, money lent by Myron Phelps to S. S. Phelps & Co., and that only a payment of seventeen hundred dollars and fifteen cents, May 7, 1861, had ever been made on them. There is nothing whatever in the evidence contradictory thereto, more than the circumstances of the case which have been detailed. It must be considered, under the proofs, that Myron Phelps took the conveyances to him as security for the payment of a just indebtedness due him, and we see no sufficient reason why he should not be allowed to hold them for such purposes. Whatever may have been the character of the transaction between S. S. Phelps and William Phelps, we find no sufficient evidence to connect Myron Phelps with it, either as a participant or as having knowledge thereof. It would seem, at the most, that the conveyances to Myron Phelps were no more than constructively fraudulent, and the rule is well settled, in equity, that when a security or conveyance is set aside as constructively fraudulent, it may be upheld, in favor of one not guilty of any actual fraud, to the extent of the actual consideration, and be vacated only as to the excess. (*Wright et al. v. Stanard*, 2 Brockenbrough, 312; *Coley v. Coley*, 1 McCarter Ch., 350; *Demorest v. Terhune*, 3 C. E. Green, Ch., 532; *Boyd v. Dunlap*, 1 Johns. Ch., 478; *Clements v. Moore*, 6 Wall., 299.) We are of opinion, then, that the decree was wrong in declaring the conveyances from William to Myron Phelps to be utterly void as against the complainants, and appropriating the real estate therein described unqualifiedly to the satisfaction of the debts due to the complainants. We think the debt due from William to Myron Phelps was entitled to priority of payment out of that real estate. The decree declared a lien upon certain specified portions of the real estate described in the last-mentioned conveyances, for the satisfaction of the sum of nine thousand eight hundred and eight dol-

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lars and ninety-six cents, the amount due to the complainants from "said defendants," and the costs of the suit, and then ordered that "said defendants" pay to the master in chancery the amount so due to the complainants, together with interest and costs, in ninety days, which payment should discharge the lien, and then directed that, in default of payment, such real estate be sold for satisfaction of said amount.

This appears to be a personal decree against S. S. Phelps, William Phelps, and Myron Phelps, jointly, in favor of the complainants, for the amount of their judgments. There is surely nothing in the record to justify any personal decree against Myron Phelps, nor, as we can see, against William Phelps, to the extent of the amount due the complainants. The decree is erroneous in this respect. The decree is further for a recovery by the complainants against William Phelps, of eight thousand seven hundred and eleven dollars and seventy-five cents. This appears to be for indebtedness from William to S. S. Phelps, and for avails of fraudulently conveyed property received by William Phelps. Besides the general objection of no fraud in the conveyances, it is objected to this portion of the decree, that it is an additional decree for part of the amount due the complainants, making a double recovery to that extent, and that the decree is in favor of complainants jointly for the amount of their several judgments, this last objection being likewise made to the joint personal decree against the defendants.

This decree against William Phelps alone was not an absolute one, but conditional upon the insufficiency of the real estate upon which a lien was declared to satisfy the complainants' judgments, and was to stand as a decree only for any deficiency, not exceeding such sum recovered, of the real estate, to satisfy the declared amount of said judgments, such deficiency, if any, to be ascertained by a sale of the real estate. As to the joint form of the decree in favor of complainants, however it may be as to the personal decree against all the defendants, we do not find it to be such in fact as respects the decree against William Phelps alone.

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The decree against him is in favor of the complainants for the amount of the recovery in the proportion which the respective claims of each of them bear to such amount, the precise amount then due on each of their respective claims having been previously found by the decree. These objections are without force. Any debts of S. S. Phelps, or of S. S. Phelps & Co., which William Phelps may have paid previously to the filing of the present bill, should be deducted from whatever proceeds he may have received from the fraudulently conveyed property; and in rendering any personal decree against him on account of said proceeds, it should only be for the balance after such deduction.

But the answers are not to be received as evidence of any such payments. They must be established by other proof. The bill in this cause was filed September 24, 1862. The complainant's judgments were recovered in May, 1862. At the March term, 1872, of the Circuit Court, the defendants filed their cross-bill herein, setting forth that, since filing their answers in September, 1863, Stephen S. Phelps filed in the District Court of the United States for the Northern District of Illinois, on the 26th day of February, 1868, his petition in bankruptcy; that, on the 7th day of March, 1868, he was adjudged a bankrupt; that, on the 15th day of June, 1868, one Elias Willets was appointed his assignee in bankruptcy; that, on the 12th day of January, 1869, said Phelps was discharged by said District Court from all his debts existing in 1868, save those excepted by act of Congress, and received his final order of discharge in bankruptcy; that the debts due complainants existed long before 1868, and were not excepted by the act of Congress; that the assignee accepted the office and discharged its duties to the approval of the District Court, made final settlement, and had been by the District Court discharged; that complainants did not prove any of their debts in the Bankrupt Court, nor did the assignee ever interfere in this cause in any way. The Circuit Court sustained a demurrer to the cross-bill, and dismissed the same, and this is assigned for error.

We perceive nothing in the matter of the cross-bill which

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should constitute a bar to complainants' claim for relief. The fraudulent conveyances, here, were not void, but only voidable by creditors, so that the property embraced in the conveyances did not rest absolutely in the assignee in bankruptcy as a portion of the bankrupt's estate; there was merely an option with the assignee, on behalf of the creditors, to impeach and avoid the conveyances or not, as he might see fit. He saw fit not to do so. Hence the bankruptcy proceeding seems to be without effect as respects this property, unless to debar other creditors from asserting any claim with regard to it, by reason of the discharge of their demands. Phelps' final discharge in bankruptcy from his liabilities should not operate to deprive the complainants of the benefit of their priority and right of lien which they acquired in respect to the property involved in their bill, by the filing of the same.

They are entitled, we conceive, to the fruits of their diligence in the institution of their suit, notwithstanding the intervening proceeding in bankruptcy. It is said the cross-bill shows the proceedings to be defective; that the assignee is a necessary party, and should have been made such. But the cross-bill alleges that the assignee has made a final settlement, and has been discharged. There is, then, now no assignee to be made a party. Moreover, the Bankrupt Act limits the time for bringing a suit between an assignee in bankruptcy and a person claiming an adverse interest, touching any rights of property transferable to the assignee, to two years from the time when the cause of action accrued for or against such assignee.

The assignee having been appointed June 15, 1868, nearly four years had elapsed since then and the accruing of any cause of action as respects the assignee, when the cross-bill was filed, and so any right of action of the assignee had been barred. The discharge in bankruptcy should have prevented any personal decree against S. S. Phelps, further than as respected the property covered by the bill. The same facts that are alleged in the cross-bill the defendants set up by way of answers, but exceptions were sustained thereto, and defendants ruled to set

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the matter up by cross-bill. Had there been no personal decree against S. S. Phelps for the amount of complainants' judgments, we should hold there to have been no error in sustaining the demurrer to, and dismissing the cross-bill. But there was error in excluding the setting up in any form the discharge in bankruptcy, and then rendering the personal decree against S. S. Phelps.

In bar of any personal decree against him further than the subjecting of the property and claims covered and reached by complainants' bill, to the satisfaction of their judgments and costs of suit, he should have been allowed to set up, in some form, his discharge in bankruptcy.

In so far as the decree sets aside, unqualifiedly, the conveyance from William Phelps to Myron Phelps, without allowing to the latter priority of payment from the property conveyed, of his debt against William Phelps, and so far as the decree is personal against S. S. Phelps, Myron Phelps, and William Phelps, or either of them, for the payment of money, the decree is reversed; in all other respects it is affirmed, and the cause is remanded for further proceedings in conformity with the opinion.

The costs in this court will be equally divided between the parties.

Decree reversed in part

UNITED STATES DISTRICT COURT—VERMONT.

MAY, 1877.

In order to render void a conveyance made by a bankrupt within four months of filing a petition with a view to give a preference, or other conveyance within six months, it must appear that the person taking it *knew* that it was made in fraud of the provisions of the Bankrupt Act in the one case, or to prevent the property coming to the assignee, or from being distributed under the act, in the other.

A conveyance made to secure an actual loan is valid if made and taken in good faith.

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Neither bad faith nor its equivalent, conduct wanting in good faith, is to be assumed, but must be proved.

E. B. CAMPBELL, Assignee, v. SILAS M. WAITE et al.

WHEELER, J.—Upon hearing this cause on bill, answers, replication, proofs, and arguments of counsel, it is considered that, in order to render a conveyance made by a bankrupt within four months of the filing a petition with a view to give a preference among creditors, or other conveyance made within six months, void under Section 35 of the original Bankrupt Act, and Sections 5128, 5129, and 5130 of the Revised Statutes, as between the person taking the conveyance and the assignee, it was only necessary, in the former case, that the person taking the conveyance should have reasonable cause to believe that it was made in fraud of the provisions of the act; and in the latter, to prevent the property from coming to the assignee, or from being distributed under the act. But by the amendments of June 22, 1874, Laws of 1st Sess., 43 Cong., 212, Sec. 11, it was made necessary that the person taking the conveyance should *know* that it was made in fraud of the provisions of the act, in the one case, and to prevent the property from coming to the assignee, or from being distributed under the act in the other, in order to render it void. And it was further provided that nothing in that Section 35 which would include those sections of the Revised Statutes should “be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan.” The mortgage in question was made after these amendments went into operation and, under the law as affected by them, if the mortgage was, as to any part of it or in any sense, a preference among creditors, it would not, as the law had then been made to stand, be void, either in whole or in part, unless Waite *knew* that it was made to secure him beyond other creditors, for his debts against, or liabilities for, the bankrupt, by putting the property mortgaged out of the reach of the operation of the act, as to other creditors. If made to secure a loan of actual value,

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it would be valid if made and taken in good faith. To constitute bad faith, or a want of good faith, under these provisions of the act taken all together, as amended, there must have been actual knowledge on the part of Waite of an intent on the part of Allen to place the property mortgaged by means of the mortgage beyond the reach of other creditors, and participation in that purpose, as distinguished from constructive bad faith that, under the act before these amendments, would arise out of reasonable cause to believe these same things, whether amounting to actual belief or knowledge or not. Neither bad faith, nor what is substantially the same thing, conduct wanting in good faith, is to be assumed to exist as the foundation for relief in court, but either is to be proved before relief can be granted on account of it. The orator by his bill called on the defendants specifically to answer in respect to the purpose for which this mortgage was made, and they have answered in effect that it was to secure a loan of actual value to the amount secured by it. On the traverse of these answers the only direct evidence as to the knowledge of the parties to the mortgage and the purpose of it comes from them, and their testimony is substantially to the same effect as their answers. Notwithstanding this direct testimony, there might be proof of circumstances, if they existed, that would show that Waite did have the knowledge, or fraudulent intent, or participation in fraudulent intent of Allen, sufficient to invalidate the mortgage. The leading circumstance to this end would be that Waite knew there were other creditors who would be deprived of their rights by the transaction. It is not proved in the case that he actually did know of any debts due from Allen, besides his own, except that to the Bank and that on the judgment to Houghton. The Bank paid the debt to Houghton, and, according to Waite's testimony, he paid the whole to the Bank, so that neither the Bank nor Houghton could be defrauded by the mortgage. He knew that some of Allen's notes went to protest, but the testimony shows that all he so knew of were paid. The proof is abundant that Allen was insolvent, and that Waite knew it, but that is not enough to set aside the mortgage. Although there

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are some circumstances about the transaction that, in the absence of express proof to the contrary, would indicate that the mortgage was taken to and in the name of Waite, for the benefit of the Bank, to secure its pre-existing debt and so to give it a preference, still the testimony of both Waite and Allen is that it was in fact and effect a loan from Waite to Allen, and their testimony is not discredited or overcome, so that it appears to have been a loan. And being a loan for value, it does not appear that it was made or that the mortgage was made or taken otherwise than in good faith.

Upon these considerations the bill is dismissed, with costs.

SUPREME COURT—ILLINOIS.

JUNE, 1874.

A discharge in bankruptcy releases the bankrupt from liability as surety on a guardian's bond.

JOHN REITZ, impleaded, etc., Plaintiff in Error, v. THE PEOPLE, for the use of MARY L. STARK.

THIS was an action of debt upon a guardian's bond, in which the surety set up, as a defense, a discharge in bankruptcy. The court below decided that the discharge in bankruptcy did not release the surety on the guardian's bond, and rendered judgment against him, to reverse which judgment he brings the record into this court.

William Winkelman, for the plaintiff in error.

Greene P. Harbin, for the defendant in error.

SCHOLFIELD, J.—It is provided by one of the clauses of Section 19 of the Bankrupt Law of March 2, 1867, that, "in all cases of contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make

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claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and shall be allowed to prove the amount so ascertained." (Bump on Bankruptcy [6th ed.], 402.)

That the liability of a surety on a guardian's bond, before breach in the condition of the bond, is a contingent liability, we think, can admit of no question. The Bankrupt Law of 1841 declared that all "uncertain or contingent demands against such bankrupt should be discharged by the certificate." It was held, in *Bates v. West* (19 Ill., 134), under that language, that a discharge in bankruptcy was a good defense to an action upon a covenant of warranty, which was not broken until the certificate was granted. In *Jones v. Knox* (8 N. B. R., 559, 46 Ala., 53), it was held, under the clause quoted from the act of March 2, 1867, that the liability of surety on a guardian's bond is a contingent liability, and that a discharge in bankruptcy releases the surety from such liability. The contingency upon which appellant's liability as surety was fixed occurred on the 1st day of February, 1873, and the order for the final dividend was not made until the 6th day of April, A. D. 1874. There was, therefore, ample time in which the present claim could have been made, so as to entitle it to participate in the bankrupt's estate, in the hands of the assignee. The effect of the discharge of appellant as a bankrupt is to release him from all debts, claims, liabilities, and demands, which were or might have been proved against his estate in bankruptcy. (Bump on Bankruptcy [6th ed.], 524.) An exception in the provisions of the Bankrupt Act is that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under the act; and it is argued that, inasmuch as the guardian is acting in a fiduciary character, he could not be discharged as a bankrupt; and that

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the liability of the surety is coextensive with that of his principal, and therefore he cannot be discharged. The guardian is liable on account of his fiduciary character aside from his bond. Even if his bond were invalid on account of material errors and omissions in its language, he would still be personally liable for any failure to discharge the duties of his trust with fidelity, to the same extent he would have been, had his bond been in all respects valid. The surety, however, merely guarantees the acts of his principal.

No trust or confidence is reposed in him. He has nothing to do with the person or property of the ward, and has no control over the conduct of the guardian. He is liable simply on his contract, and according to its terms. We perceive no difference in principle between his failure to comply with this, and any other contract he might make, in which the ward is interested. Certainly the liability of the surety upon the bond of the guardian cannot, by any fair construction of language, be said to be a debt created by him while acting in a fiduciary character, so as to bring it within the exception referred to.

The same view of the law has been taken in *Jones v. Knox*, *supra*.

See, also, *Amoskeag Manuf. Co. v. Barnes* (49 N. H., 312); *Bowie v. Puckett* (7 Humph. [Tenn.], 161).

We are of opinion, for the reasons given, that there was error in the finding and judgment of the court below.

The judgment is reversed and the cause remanded.

SUPREME COURT—ILLINOIS.

SEPTEMBER, 1875.

Where one purchases goods under a contract to pay cash on delivery, and upon delivery ships them beyond the control of the vendor, and then refuses payment, such conduct may be regarded as a fraud in the creation of the

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debt under Sec. 33 of the Bankrupt Act, and his discharge will not release him.

Where a new promise to pay is made after a discharge, such discharge will not preclude a recovery.

PETER J. CLASSEN v. *BENJAMIN SCHOENEMAN*.

APPEAL from the Superior Court of Cook County.

Messrs. *Bonney, Fay & Griggs*, for the appellant.

Messrs. *Rosenthal & Pence*, for the appellee.

CRAIG. J.—There is no controversy between the parties over questions of law arising upon the record. The appellant in his argument has discussed the questions of fact, and urges a reversal of the judgment solely upon the ground that the judgment rendered by the court, before whom a trial was had without a jury, is against the weight of the evidence. Where no error of law is complained of, we cannot disturb the finding of the court unless the judgment is clearly and manifestly contrary to the evidence.

The only question, then, presented by this record is, whether there was evidence before the court upon which the judgment can be predicated. The action was brought by appellees to recover a balance due for a quantity of hides sold appellant. The amount of the debt was not disputed, but appellant interposed the defense that after the debt was contracted he was duly discharged in bankruptcy from all his debts, pursuant to the Bankrupt Laws of the United States.

To this appellees replied: First, that the debt was created by the fraud of appellant, and therefore was not affected by the discharge. Second, after adjudication in bankruptcy and after discharge, appellant promised to pay the debt. Whether there was fraud in the creation of the debt depends upon the question whether the hides were sold for cash or upon credit. If it be true that the sale was for cash, and appellant obtained the possession of the hides under an agreement to pay cash on

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delivery, and shipped them beyond the control of appellees and then refused to pay cash, such conduct might be regarded a fraud in the creation of the debt, as contemplated by the 33d Section of the Bankrupt Act. The evidence upon the terms of the sale is confined to the two appellees, on the one side, and the appellant on the other. Benjamin Schoeneman, one of the appellees, says: "In the latter part of September, 1868, he (appellant) bought of us six hundred and twenty-eight hides, weighing thirty-nine thousand four hundred and twenty-nine pounds, at twelve and a half per pound, the terms cash, as they usually were—we had always sold for cash." It also appears from the evidence of this witness, that the hides amounted to the sum of four thousand nine hundred and twenty-nine dollars and sixty-two cents; that the delivery was completed October 3d, having been commenced two or three days previous; that during the time the hides were being weighed and delivered, appellant paid two thousand dollars, and on the 6th of October seven hundred and twenty-nine dollars and sixty-two cents, making a total of two thousand seven hundred and twenty-nine dollars and sixty-two cents; that the hides were immediately shipped by appellant to Boston; that when the last payment was received, appellees, being unable to get the balance due, were obliged to take a check on the Union National Bank, which has never been paid. Samuel Schoeneman, the other appellee, testified he was not present when the hides were sold, but the terms were always cash. After the check had been obtained, he called upon appellant with it, who said: "I know I bought these hides for cash, but it is as good as cash."

By the evidence of each of these witnesses it appears the hides were sold for cash. The only evidence to contradict this is that of appellant, who testified he was to pay one-half when the hides were weighed, and the balance in eight or ten days. But even the evidence of appellant upon this point is not consistent with his act. On the 6th day of October, when he was unable to pay the balance due on the hides, he gave a check for the amount and dated it on the 10th day of October, four days later. To the amount due he added two and one-half

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dollars interest for the four days. If it be true, as appellant claims, that under the contract he was to have credit eight or ten days to pay one-half of the purchase price for the hides, we cannot well understand why appellant paid interest for the four days' time he took to pay the money named in the check. If, then, appellant obtained the possession of the hides under a contract to pay cash on delivery, and at once shipped them beyond the control of appellees, and then refused payment, it needs no argument to show that such conduct might warrant the conclusion that the debt was created by fraud; and while there is some conflict in the evidence upon this point, we are satisfied the preponderance is clearly with appellees.

In regard to the second branch of the case, if appellant, after he obtained a discharge in bankruptcy, made a new promise to pay the debt, then the discharge would not preclude a recovery.

The record contains evidence that, after petition filed, and after adjudication, and even after the discharge, the appellant promised to pay the debt. It is true, much of this was denied by appellant, but it was for the court, who heard the evidence, to determine who told the truth, and to determine upon which side the testimony preponderated, and where this has been done, and a conclusion reached upon conflicting proof, it is no part of the duty of an appellate court to interfere.

The judgment will be affirmed.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A court of equity will not aid a debtor to a bankrupt's estate to set off debts bought upon a speculation of the probable dividends against the debt he owes the estate.

Knowledge that a merchant has suspended payment generally includes a constructive knowledge of each particular suspension.

A creditor who receives a composition from his bankrupt debtor with full knowledge of all facts is not entitled afterwards to require a set-off to be

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enforced by a court of equity which he had opportunity to assert at the time the composition was made.
The courts of law in Massachusetts have authority to adjust credits.

W. P. HUNT v. E. O. HOLMES et al.

This bill was filed by W. P. Hunt against Holmes & Blanchard, alleging that he holds their notes to the amount of eighteen thousand dollars and over; that Holmes & Blanchard brought an action against him in the Supreme Judicial Court for Suffolk County for breach of contract; that he denied all liability, and defended the action; that, before the cause was tried, the defendants in this suit, plaintiffs in the action, became bankrupt, and made a statute composition with their creditors in March, 1876, by which they were to pay forty per cent. in six, ten, fourteen, and eighteen months, and have tendered the plaintiff and have left with him, though he refused the tender, money and notes amounting to forty per cent. of his debt against them; that afterwards, in September, 1876, a verdict was recovered against him by said Holmes & Blanchard for twelve thousand dollars, in the action of contract, and that the court have overruled his exceptions; that it was the right of the plaintiff to have a set-off in that action, or in the composition proceedings, but the bankrupts intend to levy the judgment in full; and the bill prays that they may be enjoined from doing this, and that the account may be stated, and the balance only be allowed or paid.

There was an oral hearing on the motion for an injunction, in which the evidence tended to show that Holmes & Blanchard failed in October, 1875; that an informal meeting of their creditors was called, and a committee was appointed, who at an adjourned meeting recommended a compromise at forty per cent.; that some creditors objecting, an involuntary petition in bankruptcy was filed against Holmes & Blanchard, December 27, 1875; that they offered a composition of forty per cent., part in cash and part in notes, indorsed by a solvent merchant, and a resolution to accept it was duly passed; that the plaintiff, Hunt, acting for a company of which he was the agent,

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opposed the order to record the resolutions, and when the order was made, applied to the Circuit Court to set it aside, but it was confirmed in that court, May 27, 1876, and Hunt received the money and indorsed notes for forty per cent. of his debt of eighteen thousand dollars. The debt which he held had been bought after Holmes & Blanchard had stopped payment, as he and the sellers well knew, but whether before the petition in bankruptcy, or before a known act of bankruptcy, and whether with a view to use them in set-off or otherwise affect the proceedings in bankruptcy, was controverted.

R. D. Smith, for the plaintiff.

E. Morwin, for the defendants.

LOWELL, J.—The injunction must be refused. 1. The set-off is not one which a court of equity will interfere to enforce.

Section 6 of the Statute of 1874 (18 Stats., 179), amending the law of bankruptcy, forbids a set-off of debts bought after the act of bankruptcy upon which the adjudication shall be made and with a view to such set-off. This has been understood to mean that a debtor, having notice or knowledge of an act of bankruptcy committed by his creditor, shall not afterwards buy up debts against the creditor, with a view to set them off in case adjudication of bankruptcy follows the act. Before this amendment there was a serious difference of opinion in the courts upon the question whether a debt bought after a known insolvency and before actual bankruptcy could be set off. Congress certainly seems by the amendment to say, by a necessary implication, that debts bought after insolvency may be so set off, unless they are bought after an act of bankruptcy, and after the very act which is the foundation of the decree and with a view to such set-off.

The act of bankruptcy charged against Holmes & Blanchard was the suspension for forty days of a note, payable October 6, 1875. The plaintiff bought notes amounting to eighteen thousand dollars, with knowledge of the failure of Holmes & Blanchard, and for the same price which they had

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offered in composition, except that interest began earlier; but some of the notes were bought within the forty days; and the plaintiff testified that he had no intention of setting the notes against the debt or cause of action upon which he was sued and to which he believed he had a perfect defense on the merits. Knowledge of a general suspension includes, I think, constructive knowledge of each suspension, because the whole includes its parts, and as it is only a general suspension that is an act of bankruptcy, the particular note or notes mentioned in the petition for adjudication are to be taken as samples or indications of the general fact of which the plaintiff had notice. Whether notice of an incomplete act of bankruptcy is enough, may be a question; and whether "a view to such set-off" means an actual intent at the time of purchase. However these questions may be answered, a court of equity ought not to interfere by injunction to enforce a set-off when the debt has been bought after insolvency on a speculation as to the probable dividend. The decisions to which I have before referred, which denied the right of set-off in such cases, though they may not conform to the present state of the statute, are grounded in a clear and strong equity which cannot be disregarded when the discretionary action of the court is invoked.

2. The plaintiff has waived any set-off he may have had.

The composition was offered, and was litigated with this plaintiff, though he acted in a representative capacity; the notes which he held were supposed to belong to the bankers from whom he had bought them. He gave no notice that he was the true creditor; made no attempt to have the accounts adjusted; when the composition was finally passed, he received his proportionate part. He says in his bill that he refused the tender, but there was no evidence of a refusal. The law is that one who proves a debt in full, with knowledge of all facts, waives any set-off he may have. (*Stammers v. Elliott*, L. R., 3 Ch., 195; *Brown v. Farmers' Bk.*, 6 Bush, 198.) In composition, creditors are not bound to attend the meetings, and prove their debts, and vote for or against the resolutions, unless they choose to do so, but when there are disputed accounts and mat-

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ters to be liquidated and adjusted, I do not know that it is more the duty of the debtor than of the creditor to move the court for a settlement. Here it was at the election of the plaintiff to take his dividend on the notes which he had bought and of the purchase of which he had never notified Holmes & Blanchard, so that, in fact, he alone had the opportunity to apply for the set-off. When he took his dividend he waived his claim of set-off, and there is no evidence that he received the money or indorsed notes under protest, or by mistake, or under any other circumstances which would entitle him to a rehearing or readjustment.

3. The remedy at law is adequate.

It was not uncommon in early times for the court of chancery or bankruptcy to grant an injunction until a set-off was adjusted; but the courts of law in which an action is pending have now full jurisdiction of the subject. It was said that the statute in Massachusetts does not permit a set-off of debts bought after an action is begun; but the Bankrupt Law is binding on the courts of Massachusetts, and if it be true, as I do not doubt it to be, that when a plaintiff has become bankrupt, the defendant may, upon some proper terms, bring into court whatever set-off the broad and liberal doctrine of mutual credit admits, then the courts of law of the State are as competent, and, for aught that appears, as ready to afford relief as those of equity or bankruptcy. I certainly should not assume the contrary until the experiment had been tried.

Motion for injunction denied.

UNITED STATES DISTRICT COURT—E. D. WISCONSIN.

Where an attachment upon property of the bankrupt for its full value is dissolved by an adjudication, a judgment creditor who has made a levy subject to such attachment is not entitled to priority as against the assignee. But where a creditor has obtained a valid and effectual lien by attachment, and has prosecuted his suit to judgment, and made an execution levy, his lien under such levy is to be considered as prior in time to that of other

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creditors who have levied attachments in the meantime, and is not affected by the dissolution of the attachments.

In re ROSCOE R. STEELE and WILLIAM H. ROLF.

Mr. Pereles, attorney for petitioners.

Mr. Noyes, attorney for assignee.

DYER, J.—The petitioners, S. A. Field, and Blair & Persons, who are creditors of the bankrupts, apply for an order directing the assignee to pay to them the amount of certain judgments, recovered by them against the bankrupts before the bankruptcy, and upon which judgments they claim they obtained, by virtue of execution levies, liens upon certain property. The facts necessary to consider are these:

On the 3d day of January, 1877, John Bromley and others, creditors of the bankrupts, commenced suit against their debtors in the Circuit Court of Milwaukee County, to recover the sum of three hundred and nineteen dollars and thirty-five cents and interest, and attached a certain stock of goods belonging to the bankrupts. On the same day Henry Newberger and others commenced suit by attachment in the State Court against the bankrupts to recover the sum of one thousand three hundred and twenty-eight dollars and five cents and interest, and attached the same stock of goods attached in the action before named. On the same 3d day of January, the petitioner, Samuel A. Field, commenced an attachment suit against the bankrupts before a justice of the peace, to recover about the sum of two hundred dollars, and attempted to attach the same goods, subject, however, to the two attachments before mentioned, which were prior in time. On the fourth day of the same month, the petitioners, Blair & Persons, commenced an attachment suit against the bankrupts before a justice of the peace, to recover about the sum of seventy-five dollars, and attached said stock, subject to said prior attachments. On the 5th day of January, Enoch R. Artman and others, creditors of the bankrupts, commenced an attachment suit against them in the Circuit Court of Milwaukee County, to recover the sum of

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two thousand one hundred and ninety-two dollars and sixty-two cents and interest, and attached the same property, subject to the prior seizures.

According to an inventory and appraisal made by the officer under the first attachments, the entire stock of goods attached in all the cases was of the value of two thousand four hundred and fifty-eight dollars and one cent. Facts disclosed by the affidavits show that, in the suit brought by the petitioner Field, no valid seizure under the attachment issued in that case was made, but on the 18th day of January, 1877, judgment was obtained for two hundred and sixteen dollars and twenty-nine cents, and execution was on the same day issued, and levy under the execution upon said stock was made, subject to the prior attachments. Judgment was also rendered January 11th, in the action commenced by the petitioners, Blair & Persons, for the sum of seventy-six dollars and fifteen cents, and execution was issued on the same day, and levy made, subject to the lien of prior attachments. There is no evidence that these judgments were obtained, or the execution levies made by any collusion with the debtors. Judgments were never obtained in the actions commenced respectively by Bromley *et al.*, Newberger *et al.*, and Artman *et al.*; but subsequently, and within four months subsequent to the 3d day of January, when the first attachment was issued, bankruptcy proceedings were instituted against Steele & Rolf, and they were adjudged bankrupts, and an assignee was chosen. On the 8th day of February, 1877, the sheriff holding the stock of goods under the attachments and execution levies made a general surrender of possession of the goods to the assignee, excepting a certain portion set apart under the levies upon execution made in favor of petitioners, Field and Blair & Persons, and which portion, when so set apart, it would seem was left with the assignee as custodian, under an agreement that it was to be redelivered on demand, or that the assignee would pay the amount of the executions.

Upon this state of facts, petitioners claim that they are entitled to be paid the amount of their judgments in full.

The three attachments pending at the time of the adjudica-

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tion in bankruptcy were dissolved by operation of law. Inasmuch as no valid seizure under attachment was made in the action brought by the petitioner Field, he acquired no lien upon the property, until his execution levy, January 18th, if indeed any was then acquired. The levy then made was necessarily subject to the attachments in favor of Bromley, Newberger, and Artman, which were prior in time, to say nothing of the attachment in favor of Blair & Persons. The value of the entire property attached being two thousand four hundred and fifty-eight dollars and one cent, and the demands in favor of Bromley, Newberger, and Artman, amounting in the aggregate to three thousand eight hundred and forty dollars and two cents, it appears that, at the time of the execution levy by Field, the entire value of the property was covered by demands, to secure which the three prior attachments before named were issued. In other words, all the right which the petitioner Field acquired was by a levy on property already subject to attachments to its full value. The question, then, is, did the dissolution of the prior attachments inure to the benefit of the judgment creditor, and can he be let in to claim priority as against the assignee in bankruptcy?

Upon this question the courts have not been silent; and without extended discussion it may be determined upon a brief review of the decisions.

In the case of *Julius Klancke* (4 N. B. R., 648), the property of the bankrupt was seized upon attachment. After the levy of the attachment, judgments were obtained by other creditors and executions were issued and levied upon the property previously attached. The amount of the prior attachment exceeded the gross amount of the property; and the property having been converted into money, and bankruptcy proceedings having been commenced against the debtor, the judgment creditors applied for payment in full, claiming that the attachments having been discharged, and they having a *bona fide* levy under their executions before the filing of the petition in bankruptcy, the lien of their executions was saved, and that they were entitled to preference. Judge BENEDICT denied the

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application, holding that the provisions of the act for preserving existing securities do not indicate any intention to improve the condition of any creditor or create new rights; that all the right which the judgment creditors acquired was by a levy on property already subject to an attachment to its full value, and that such a levy gave the judgment creditors no security, and did not entitle them to apply to the court for a payment of their judgments in full out of the proceeds of the estate.

The case of *Johnson, Assignee, v. Rogers et al.* (15 N. B. R., 1), was one where the bankrupts had executed a general assignment of all their property for the benefit of creditors. Subsequently certain creditors commenced actions and recovered judgments which were claimed to be liens upon real estate. Bankruptcy followed, and a contest arose between the assignee in bankruptcy and the judgment creditors respecting the validity of the liens asserted by these creditors. And although Judge WALLACE holds that, if an assignment is void as intended to hinder creditors, a creditor may obtain a lien upon the real estate by getting a judgment against the debtor, and upon the personal property by the levy of an execution thereon, and that such liens will be valid as against the assignee in bankruptcy if they are obtained before the commencement of the bankruptcy proceedings, he nevertheless lays down this proposition in his opinion: "If the assignment had been void only because contrary to the provisions of the Bankrupt Act, and the assignee in bankruptcy had obtained a decree setting it aside upon this ground, the judgments of the several creditors would not have been liens upon the real estate; as against these judgments the assignment would have been effectual to transfer the title to the original assignees. If these creditors had no liens prior to the commencement of the proceedings in bankruptcy they would acquire none thereafter, and the assignee in bankruptcy would take the property as it was at the commencement of the proceedings, for distribution to all the creditors of the bankrupt, in conformity with the terms of the Bankrupt Act."

The case of *Biesenthal et al.* (15 N. B. R., 228), determined in

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the Circuit Court of the United States for the Northern District of New York, was also one of voluntary assignment of property for the benefit of creditors without preference. Afterwards creditors recovered judgments and issued executions by virtue of which levies upon personal property were made. Subsequently, bankruptcy proceedings were commenced against the assignors, and the question was, whether the assignee in bankruptcy was entitled to the proceeds of the property to the exclusion of the execution creditors' claim of priority. The assignment made by the bankrupts was not made to hinder, delay, or defraud creditors, but was held void under the Bankrupt Law against the assignee in bankruptcy; and Judge JOHNSON holds that, upon avoidance of the assignment by the assignee in bankruptcy, judgment creditors who had levied upon the property, after the assignment and before the commencement of the proceedings in bankruptcy, have no priority over the assignee. He says: "When the assignee recovers the property, he takes it as the debtor had it at the time of the act which the assignee avoids, so far as creditors of the debtor are concerned. Avoiding the transfer in favor of the assignee in bankruptcy does not revest the property in the debtor, but vests it directly in the assignee, who takes it by virtue of the statute. The transfer by the debtor, good against him and good against his creditors, prevents any lien by subsequent judgment or execution. Upon the property so situated the statutory transfer to the assignee in bankruptcy operates directly, and cannot be subjected to the liens of intervening judgments and executions without overthrowing both the language and the policy of the Bankrupt Law in its most vital provisions."

In the case of *Badenheim et al.* (15 N. B. R., 370), it was held that where the property of the bankrupt had been attached, and other creditors had subsequently obtained a judgment under which an execution levy of the same property was made, and bankruptcy proceedings followed, by virtue of which the attachment was dissolved, the seizure under the attachment held the property free from the lien under the execution up to the dissolution of the attachment by the bankruptcy proceed-

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ings, so that there was no time at which the lien under the execution could attach.

While perhaps the reasoning in the last-mentioned case is liable to be questioned, the general principles laid down in the cases referred to seem to be sound. It is not to be overlooked that we are dealing with a case where the prior attachments embrace demands sufficient in amount to exhaust the entire value of the attached property. If those attachments were to stand untraversed and unaffected by the bankruptcy proceedings, the judgment creditor now claiming priority would get nothing. The attachments being dissolved as a consequence of the bankruptcy proceedings, to permit a subsequent judgment creditor to intercept the fruits of avoiding the attachments, and thus prevent equal distribution, in the language of Judge JOHNSON, "would subvert the whole laudable purpose of the Bankrupt Act so far as creditors are concerned." The analogy in this respect between the case of an attachment and that of an assignment for the benefit of creditors is apparent, and the same principles may be invoked in determining the rights of parties in both cases.

Both the assignment and the attachment are good against the debtor and against his creditors. Both are avoided only by operation of law. No more in one case than in the other where the entire property is exhausted by the attachment, or covered by the assignment, can intervening judgments and executions secure to particular creditors liens which have priority against the assignee in bankruptcy. Attachments issued within a limited period before the commencement of bankruptcy proceedings are dissolved by the Bankrupt Law for the benefit of all creditors, and not for the benefit of a few; and it was not intended by the law to bestow upon particular creditors new or better rights, as the result of the avoidance of such attachments.

It should be observed, that in the case of *MacDonald, Assignee, v. Moore et al.* (15 N. B. R., 26), Judge BLATCHFORD held that when an assignment is set aside at the suit of an assignee in bankruptcy a creditor who levied on the property

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assigned, before the commencement of the proceedings in bankruptcy, and after the execution of the assignment, is entitled to priority. The ruling in this case, as will be seen, is not in accord with the other cases cited, and though the Supreme Court of the United States has strongly enunciated the principles upon which, under the Bankrupt Law, the rights of judgment creditors are to be determined (*Wilson v. City Bank*, 9 N. B. R., 97, cited by Judge BLATCHFORD), it seems irreconcilable with a just administration of the law to hold that where the property of a debtor has been attached to its full value, and where a subsequent judgment creditor makes a levy upon the same property, that such creditor gets a security which, upon dissolution of the attachment by reason of bankruptcy proceedings, gives him priority.

The position of the case of the petitioners Blair & Persons is different. They made an effectual and valid levy by attachment on the 4th day of January, 1877. Their attachment was subject only to the attachments in favor of Bromley *et al.*, and Newberger *et al.* The aggregate amount of the demands in those two cases was one thousand six hundred and forty-seven dollars and forty cents. This did not exhaust the full value of the attached property, but left a surplus of eight hundred and ten dollars and sixty-one cents, upon which Blair & Persons could acquire an effectual lien. Holding their attachment levy, they prosecuted their suit to judgment and made execution levy, which was in force when bankruptcy proceedings were commenced. It is true that, intermediate their attachment and execution levy, other creditors—Artman *et al.*,—commenced suit by attachment against the bankrupts, and made seizure of the property, which seizure was in force at the time of the execution levy by Blair & Persons. But the right or lien acquired by Blair & Persons by virtue of their attachment was prior in time, and its priority as to the surplus of the property over and above the attachments of Bromley and Newberger continued to time of judgment, and was preserved in the execution levy. Blair & Persons were then in the position of judgment creditors, holding, at the time bankruptcy pro-

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ceedings were commenced, an effectual lien by *bona fide* execution levy on property more than sufficient to pay their demand and also the demands of prior attaching creditors. The dissolution of the attachments in the then pending actions by operation of the Bankrupt Law did not improve their condition or extend their rights. They occupied the same position after the discharge of the attachments that they held before, and their lien must be recognized.

The application for payment of the judgment in favor of Field will be denied, and that in favor of Blair & Persons will be granted.

UNITED STATES DISTRICT COURT—E. D. VIRGINIA.

AUGUST 2, 1877.

Where a partnership of two partners in equal interest were bound as a firm as surety for a debt, and a decree was rendered against the firm for the debt, to be paid, and which was paid, out of the social assets, the firm having been dissolved, and a balance having been left due, but not ascertained by judicial judgment or decree, from one of the partners to the other, and the partner who owed the balance having, after all this, gone into bankruptcy:

Held, That the solvent partner had no right to be subrogated to the rights of the creditor of the firm, who obtained the decree, for half the amount paid, against the individual estate of the bankrupt partner, as against other creditors of that partner.

In re G. W. SMITH, Bankrupt.

On exceptions of P. W. Harwood, late partner, to the report of liens and their priorities, made by Special Commissioner Howard.

G. W. Smith and P. W. Harwood were partners under the name of *Smith & Harwood*. In a chancery suit between the partners for a settlement of accounts, it was ascertained by a decree of June 26, 1873, that as of the 3d of June, 1873, their partnership assets amounted to twenty thousand nine hundred and fifty-three dollars and forty-five cents, and their debts to

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thirteen thousand eight hundred and seventy-seven dollars and thirty cents, leaving an estimated surplus of seven thousand and seventy-six dollars and fifteen cents, but that Smith owed Harwood, on account of the transactions of the firm, ten thousand and seventy-five dollars and fifteen cents. There has been no final decree ascertaining the clear assets of the firm, and requiring Smith to pay any finally ascertained sum to Harwood.

In a suit pending at the time by Douglass H. Gordon against one L. W. Rose as principal, and the firm of Smith & Harwood as guarantors, for a debt held by Gordon against Rose, there was a recovery, by decree of May 13, 1874, against these defendants. The property of Rose being insufficient to pay the whole debt, the decree required the firm of Smith & Harwood to make good a deficiency of five thousand eight hundred and ninety-four dollars and sixty-three cents, due as of June 6, 1874, which sum was directed to be paid, and was paid, out of the assets of Smith & Harwood.

Smith afterwards went into bankruptcy, and this court became charged with the duty of settling his estate. Harwood, by exception to the report of liens and their priorities, made in the cause by Special Commissioner Howard, claims a lien upon the individual estate of Smith, by right of subrogation to Gordon, for half the debt of five thousand eight hundred and ninety-four dollars and sixty-three cents, which was paid out of the partnership assets to Gordon.

E. Y. Cannon and *C. U. Williams*, for the exceptant.

F. M. Conner, for the other lien creditors.

HUGHES, J.—If this debt of the firm had not been paid out of the social assets, but had been paid out of the individual property of Harwood, then the question of subrogation as to half the debt, in favor of Harwood, might arise. But the debt having been paid with social assets, there is no right of subrogation as to Harwood's half, so far as the debt specifically paid with social assets is concerned.

If in the suit for settlement between the partners a final

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balance had been found due from Smith to Harwood, and a decree rendered requiring Smith to pay that balance to Harwood; and afterwards this debt to Gordon had been decreed, and Harwood had paid it out of his individual means; then, and in that event, Harwood might have had a right of subrogation for half against Smith's individual estate. There is no reason why a person who is a partner, has become surety for another happening to be partner, and has out of his individual means, after final settlement of the partnership affairs, paid a joint debt, should not be subrogated to the rights of the creditor of both against the individual estate of the other partner, for the proportion of the joint debt for which his other partner was liable. See Willard's Equity, ed. 1875, pp. 107 to 117, and cases cited. But this right of substitution plainly cannot arise when the debt was a social debt, and was paid with social assets; certainly not as against the creditors of either partner.

The debt to Gordon was a social debt, and paid out of social assets. The payment consumed, or well-nigh consumed, the whole assets of the firm, leaving Smith's debt to the firm, which amounted on the 3d of June, 1873, to ten thousand and seventy-five dollars and sixty-three cents, wholly or almost wholly due.

If Harwood had obtained a decree against Smith for a definite sum as the balance due especially to himself, into which balance this debt paid to Gordon would indirectly have entered, the balance itself might have been claimed of Smith by Harwood, as any other creditor might claim an ascertained debt. But Harwood cannot, in the absence of such decree of final settlement, go back of it to the suit of Gordon against the firm, and claim contribution out of Smith's estate for half of the Gordon decree. The payment of that decree out of the social assets only created an item in the account between the two partners and their firm, and only indirectly fell upon Harwood for payment out of his portion of the social assets, or his individual estate.

The report of the Commissioner in this respect, as in all others, must be confirmed; and I will sign a decree accordingly.

In re Alsberg.

UNITED STATES DISTRICT COURT—DELAWARE

When A obtains goods of B, representing himself to possess property which he does not possess, and such representations induce a credit which the seller would not give without it, A has "created" a debt "by fraud," in violation of the Bankrupt Law, Section 5117, Revised Statutes U. S.

When A obtains goods, making no other special promise of payment than is involved in the ordinary assumpsit or undertaking to pay for goods purchased, but deliberately intending at the time not to pay for them, he has "created" a debt by "fraud," in violation of the provisions of the Bankrupt Law in Section 5117, Revised Statutes U. S.

Where a bankrupt is in prison or under arrest for a debt which is not dischargeable in bankruptcy, the United States Court, on a writ of *habeas corpus*, will not discharge him.

"Order 27 in Bankruptcy," prescribed by the Supreme Court of the United States for the regulation and government of the courts in bankruptcy matters, as regards the arrest of the bankrupt, and petition for release, must be construed as not applying to cases where the debt is dischargeable.

The question to be determined is one of fact, viz.: was the debt for which the bankrupt was arrested dischargeable under the Bankrupt Law, or not?

This question must be determined by the court or judge hearing the *habeas corpus* case, on all the legal evidence within its or his reach.

No *ex parte* affidavits made in the State Courts as to character of the debt contracted, and no evidence of want of authority in the State Courts to arrest for the frauds contemplated by Section 5117 of the Revised Statutes, will be permitted to interfere with the full examination from all sources of evidence of the simple fact, whether the debt was or was not dischargeable under the Bankrupt Act.

If the debt for which the prisoner is arrested is of such a character, it matters not that the State laws do not give authority to arrest for the frauds mentioned in said Section 5117, Revised Statutes.

It is the character of the debt as affected by the frauds mentioned in the said section which is the subject of investigation, and not the grounds of arrest which the creditor may or may not have under the State laws.

If the debt is dischargeable in point of fact, on the evidence before the court, no declaration to the contrary in any State proceedings will be considered.

The provisions of law in reference to the writ of *habeas corpus*, Sections 760 and 761, Revised Statutes U. S., when the petitioner claims the protection of a United States law against his imprisonment, are conclusive on the judge or court hearing the case, as to the admission of all legal evidence touching the right to retain in custody or discharge.

In re MARTIN ALSBERG, Bankrupt.

PETITION for writ of *habeas corpus*.

Charles B. Lore, Sam'l M. Harrington, and J. H. Hoffecker, for the creditors.

In re Alsberg.

Hon. William G. Whiteley and Anthony Higgins, for the bankrupt.

Martin Alsberg, a dry goods merchant, having failed in 1872 or 1873, settled with his creditors, and in September, 1875, again began business. He purchased a stock of goods worth about nine thousand dollars. He had sold in January, 1875, a house from which he realized about fifteen hundred dollars cash, and in June, 1875, another, realizing three thousand dollars cash, and a mortgage for five hundred dollars, which he sold October 27, 1875. He sold another house October 4, 1875, realizing twenty-five hundred dollars cash and a mortgage for two thousand dollars, which he still holds. On March 25, 1876, he sold the last house he owned, realizing twelve hundred and forty-two dollars cash. In July and Sept., 1875, and April, 1876, he made certain representations which are more fully given hereafter. He bought and sold largely and paid all bills within ten days, obtaining his discounts, establishing credit, and purchasing closely until about April 24, 1876. From that date until July 12th, the day of his failure, he bought freely and on one or two occasions recklessly. A meeting of his creditors was called July 12, 1876, to take place on the 18th, at 3 P.M.

Alsberg had given a judgment bond to his mother-in-law, Rosa Buxbaum, September 28, 1875, for forty-two hundred dollars. This bond was entered July 12, 1876; execution was issued July 18, 1876, and was placed in sheriff's hands at 10 A.M. of that day. Alsberg reported to his creditors that his debts were as follows:

Book Debts.....	\$13,094 90
Buxbaum, Judgment.....	4,200 00
	<hr/>
	\$17,294 90

ASSETS.

Accounts due.....	\$4,000
Rehfuss Mortgage.....	2,000
Stock about.....	8,000 or 9,000

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No arrangement was made at the creditors' meeting. Alsberg continued to sell until October, when the sheriff took possession. The sheriff sold the goods October 20th, in bulk, to Albert Alsberg, of New York, for thirty-five hundred dollars, and he on the same day sold them to Mrs. Martin Alsberg for the same price, taking her seven promissory notes in payment.

The following decision was rendered, January 6, 1877:

BRADFORD, J.—The petitioner, Martin Alsberg, in this *habeas corpus* case, has been imprisoned in the common jail of New Castle County, on certain writs of *capias ad respondendum* issued out of the Superior Court of the State of Delaware, at the instance of creditors of the said Alsberg in Philadelphia, Pa.

Under a late Act of Assembly of the State of Delaware, abolishing the use of these writs in civil actions generally, the exception is made when the plaintiffs file written affidavits of fraud, stating, in the language of the act, "that to the best of his or their belief the defendant had absconded, or is about to abscond, from the place of his usual abode, or that the defendant is justly indebted to the plaintiff in a sum exceeding fifty dollars, and that he verily believes the said defendant has secreted, conveyed away, assigned, or disposed of either money, goods, chattels, stock securities for money, or other personal estate or real estate of the value of more than one hundred dollars, with intent to defraud his creditors, and shall moreover in such affidavit specify and set forth the supposed fraudulent transactions."

After Martin Alsberg (the petitioner for discharge under the writ of *habeas corpus*) had filed his voluntary petition as a bankrupt, and the jurisdiction of the United States District Court for this District had attached to all persons, matters, and things having any relation to the estate of the bankrupt, he was taken on these writs, issued under the authority aforesaid, and grounded on the affidavits required by law which justified their issuance.

Under these circumstances, the petitioner has invoked the

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aid of this court to release him from imprisonment, on the ground that he would have a right to be discharged from these debts under his certificate of discharge in a court of bankruptcy, and that to permit his imprisonment, after the jurisdiction of the Bankrupt Court had attached, would be unjust to the petitioner, and defeat the purpose for which the Bankrupt Law was enacted, and in violation of the following, viz.:

Section 5107 of Title 61, Bankruptcy Revised Statute of the United States: "No bankrupt shall be liable, during the pendency of the proceedings in bankruptcy, to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." We turn to another part of the act, and we find the character of the debt which will not be discharged, in these words: In Sec. 5117, same Title, Chap. 5, of the U. S. Revised Statutes, it is provided, "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy, but the debt may be proved and the dividend thereon shall be a payment on account of said debt." So that we are brought directly to the question, Were these debts on which these capiases have been issued "created by the fraud of the bankrupt," or not?

There is no proof going to show embezzlement or abuse of a fiduciary trust, either public or private, and as these are all the delinquencies enumerated in the statute which give the debt such a character as to forbid its discharge, we must confine ourselves to that simple investigation—fraud in the bankrupt in creating the debt. If there was such fraud, then a certificate of discharge will not free him from the debt, and by the terms of the Bankrupt Act (Sec. 5107, above quoted) he is not freed from arrest by the State Courts in civil suits. If there was not such fraud, then he will be discharged, for it is then such a debt as would be discharged by the certificate of discharge granted finally to the bankrupt.

Were these debts created by the fraud of the bankrupt?

There is no principle of law or equity more universally

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acceded to than "that fraud is never to be presumed." It must always be proved, and when the matter of a man's personal liberty is in issue, it ought to be convincingly proven. And yet fraud is of such a character, lies so buried up in a man's secret intentions, as to be inaccessible to ordinary observations. It would defeat its own purposes were it outspoken, and hence secrecy is its favorite hiding-place. Fraud is a deceit practiced to another man's disadvantage; there must be an intent to mislead, carried into operation by some act, on which the deceived party rests to his own detriment. Human courts do not attempt to punish men for wicked intentions which have never been acted on. Such sins of intent are reserved for punishment by a High Tribunal, of greater justice and penetration than earth can furnish.

There is no distinction between a fraud proven in a court of law and a fraud proven in equity. For while courts of equity furnish greater facilities for discovering and uprooting fraud than courts of law, yet when once proven in a court of law, it is equally damaging to the perpetrator. Now in proof of fraud, as its essence is in the "*scienter*," the "*animus*," the "*evil intentions*," things that cannot be seen or heard and are not cognizable by the senses, we are to take into consideration the declarations and conduct before, at the time, and after the alleged fraudulent act (and a wide latitude of investigation is to be allowed), and from these declarations and this conduct we are to draw our inference as to the *existent* or *non-existent* fraud at the time of the purchase of the goods in question. Slight evidences of fraud will not suffice. They must be convincing.

It is contended by the creditors that the bankrupt contracted these debts by practicing two distinct forms of fraud:

1. By false representation of his available means to pay any indebtedness he might incur, which operated on the vendors as inducement to make the sales, and without which they would not have made them, and

2. By fraudulently intending, at the time of these purchases, not to pay them in whole or in part.

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It is not pretended that false representation of means for the payment of debts were made to more than three creditors, viz: Hood, Bonbright & Co., Langfeld, Lichten & Co., J. T. Way & Co.

And were this the only form of fraud practiced, I should discharge the petitioner from arrest in all cases except in those above named.

Now, how far have false representations of available means made to these creditors induced them to sell the goods for the price of which they have brought suits in the Superior Court?

The first statement of this kind was made to Mr. Crow, between the 1st of April and May, of the year 1876, in the railroad cars, between this place and Philadelphia. Mr. Crow was the traveling and selling agent of this firm. Alsberg said "he could pay two dollars to every one he then owed."

In July, 1875, Alsberg said to Benj. H. Cregor, who had charge of the credit department of this firm, that "he held real estate worth near twenty thousand dollars." Mr. Cregor said that his credit was based on this representation then made.

About two months before the failure, Alsberg said to Robert Mills, salesman for Langfeld, Lichten & Co: "You ought to sell me cheap, for I (referring to the failure of Mr. Wainright) am worth two dollars for every one I owe."

About this time, as it appears, he stated to Henry M. Rosenbaum, the financial manager of the last-mentioned firm, that he was worth twenty-five thousand dollars, "you need have no fear of me" (commenting on Wainright's failure), and stating that he had a couple of properties in Wilmington.

Witness then stated that he would have sold if he had stated nothing about his property.

Witness afterwards modified this statement and said: "The effect of this statement as to property then made prevented me from making future inquiry, which if I had made and had found his statements false I would not have given him the subsequent credit I did." He further said: "I cannot say that I mentioned this conversation as to the property to any member of the firm. I understood the two properties to be part of the

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twenty-five thousand dollars." He said on one occasion that he had a property on King Street worth twelve thousand dollars. The exact date of this conversation is not on my notes—he said this to William Marter, salesman for J. T. Way & Co. Marter says his line of credits was due altogether to his statements—he did not after modify them.

These by my notes constitute all the cases of false representations as to the value of his property. It is true that these statements are materially untrue. They doubtless assisted the vendors in making up their minds to give the credit they did, in cases where the information had before been communicated to them. But when the purchaser had for a considerable period of time bought freely, and commended himself to their confidence by extraordinary promptness of payment (as is testified to on all sides), would they have refused these last credits, if they had heard nothing of Alsberg's property? The fact is, Alsberg had gained the trust of these creditors by his prompt payments, and they solicited his purchases (as was most natural and legitimate). Mr. Rosenbaum said he would have sold if he had heard nothing of Alsberg's property, and this is inconsistent with the attempted modification of that answer, to wit: that without this statement he would have started an inquiry as to Alsberg's means. This could not be, for if he had sold, he would have given the credit, and it would have been too late.

Nevertheless, whatever may be our opinion as to the desire of these firms to sell to Alsberg, two of these witnesses for the two firms of Hood, Bonbright & Co., and J. T. Way & Co., viz.: Cregor and Marter, explicitly say that the line of credit of these firms was due to, and based on Alsberg's statements as to his property—and on this testimony we must rest as true and say that fraud in the shape of false representations in these cases has been proven—false representations to the financial member in the one instance and to the salesman in the other—and were this the only fraud the petitioner would be discharged from arrest in all but these two suits. But on a careful examination of the testimony, I am compelled to de-

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cide as *a fact* proven convincingly, that the petitioner for discharge intended at the time he purchased these goods, for the price of which the arresting creditors have brought suit, not to pay for the same, either in whole or in part, *it is immaterial which.*

I shall not enter into the testimony in detail, but shall speak of the prominent facts, which, taken altogether and in their natural relation to each other, have produced this conviction.

1st. The greatly increased later purchases in the months of April, May, and June, 1876, by which he stocked his store to repletion, which cannot be accounted for by any ordinary hypothesis of the necessities and demands of the trade.

It is in evidence that business was materially falling off; ordinary prudence and commercial integrity should have induced diminished instead of increased purchaser's obligations.

2d. The whole manner, demeanor, and conduct of *Alsberg* to his creditors was indicative of fraud perpetrated and fraud intended.

It is true, by the proof in this cause and Alsberg's own confession, that he was much more than solvent when he offered the forty per cent. to his creditors. He stated that his stock was worth eighteen thousand dollars to one witness. He stated to another that it was worth fifteen hundred dollars. Mr. Albertson, an exceedingly careful and reliable witness, said that on the 18th of July, at the meeting of creditors, the stock in store was worth fifteen thousand. Freeman, Alsberg's clerk, placed it from thirteen to fifteen thousand. Mr. Crow also placed it about fifteen thousand shortly before the creditors' meeting. Now place this stock at the lowest figure, two thousand lower than the estimate of Albertson, say...\$13,000

Then add.....	2,000 bond.
(Returned as assets) due him per J. Buxbaum...	2,500 bond.

And we have the total.....	17,500
The creditors' debts were but.....	13,000

Leaving a balance of.....	\$4,500
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in Alsberg's favor. No wonder the creditors would not accept an offer made under such an exhibit.

3d. There is a manifest disappearance of a large mass of valuable merchandise, between the failure, 18th July, 1876, and the day of sale, 20th October, which is utterly unaccounted for. Now there is just the difference between fifteen thousand, as estimated by Albertson and others as its value at 18th July, and two thousand, as valued on the day of sale by Mr. Meehan, an experienced and skillful merchant, viz.: the sum of thirteen thousand—a difference of sixteen thousand, if estimated at eighteen thousand—the value admitted by Alsberg on one occasion. Now, it must be remembered that, from the time of this failure, none of these many creditors ever received one cent on their claims. He then owed no other debts, except two or three hundred dollars, which he paid off. What has become of these goods; and, if sold, what has become of the money—where is it, who has it? Mr. Alsberg can explain, and he does not offer to do so. He sits by, day by day, and hears himself denounced for vile fraud, and he opens not his mouth in his own defense. He has a right to demand to be sworn to vindicate his character. The United States, with liberal policy, in furtherance of justice, permits all persons to be witnesses in their own favor except in criminal cases. What would a man, conscious of rectitude, do in defiance of a battery of sharp cross-examining and torturing lawyers? There is only one inference to be drawn from this silence, and that is fraud.

4th. The circumstances connected with the execution of the judgment bond to Rosa Buxbaum, and the consideration therefor, are, to say the least, suspicious. The levy on the goods before petition in bankruptcy, and without making a trust for the benefit of his creditors, shows shrewd management to defeat the rights of creditors, in which Alsberg was certainly engaged as a party.

From these and other considerations which might be mentioned, I believe that Alsberg, when he bought these goods, did not intend, either in whole or in part, to pay for them.

And if such be the fact, what is the law arising on that fact?

In re Alsberg.

The conclusion to which I arrive, from reason and the slight examination of authorities I have been enabled to make, is that when A, at the time he purchases a stock of goods of B, intends either in whole or in part not to pay for them, he commits a fraud, and in the language of the Act of Congress has "created" a "debt" by "fraud."

B certainly understands that A means to pay for his goods. He promises to do so. This promise is of the essence of every such contract. B would not think of selling if he supposed that A had not made a *bona fide* promise to pay, and he parts with his goods on the strength of this promise. He acts on a promise made. It is not false representation by words, but it is deception by concealing an intention he entertains, which, if communicated to the seller, would at once determine him not to part with his goods. The law on this subject is laid down by the Supreme Court of New Hampshire, from which I will quote, 8th N. B. R., 462, *Stewart v. Emerson*.

Under this impression of the facts of this case and the law arising thereon, I must remand the petitioner to the custody of the sheriff of New Castle County.

Subsequently, to wit, May 8, 1877, the bankrupt petitioned for a rehearing. After argument and consideration, the following opinion was rendered, June 15, 1877.

BRADFORD, J.—I have given attentive consideration to the arguments on a rehearing of the *habeas corpus* case hitherto decided by me.

The grounds urged by the petitioner's counsel for the discharge of the prisoner, and an injunction against all proceedings against him until the question of his discharge in bankruptcy shall have been determined, were twofold.

1st. That the court could inquire into no other question than the provability of the debt, that there was no doubt of that fact, and therefore that the court erred in refusing to discharge the prisoner.

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2d. That if the prisoner was liable to arrest under Sec. 5107 of the Rev. Stat. of the U. S., there was no such legal proof of that fact adduced before the court as to justify it in remanding him.

This is the substance of the objection to the act of the court expressed in a few words.

In re Robinson (2 N. B. R., 341), Judge Nelson decided that the various sections of the Bankrupt Law must be construed together; that by the 21st Section of the Bankrupt Law (corresponding to 5105 of the Revised Statutes), *standing alone*, one who had proved a debt was denied the right of maintaining a suit at law or equity for the same against the bankrupt, and waived all right of action and suit against him, and all proceedings and judgments begun should be deemed discharged. But, says he, this section must be construed in connection with the 33d Section (5117, Rev. Statutes), making all debts contracted in fraud binding on and unreleased against the bankrupt, *notwithstanding his discharge*. Under the one section, if the creditor has proven his debt, his debt is discharged and any judgment obtained thereon. *Under the other*, the debt being provable, and, in the case reported, actually *proved*, it having been contracted in fraud, is not discharged; and where bankrupt was in prison on an arrest for such a debt, the court refused to discharge him or to release the bail. Says Judge Nelson: "The 33d Section (5117, Rev. Stat.) must be regarded at least as taking a debt of this character out of the 1st clause of the 21st Section (*i.e.*, 5105, Rev. Statutes), and hence that the judgment in question is not discharged or surrendered, nor is the bankrupt entitled to be released from the arrest or his bail from the bail bond, if the debt was one created by fraud."

Now, this reasoning will apply *a fortiori* to creditors not having proved their debts (though provable); for they shall only be "stayed" to await the determination of the Court in Bankruptcy on the question of the discharge, and are not held to have waived all rights from suits and unsatisfied judgments.

I consider this as high authority, 1st, on the point: that a

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debt contracted in such fraud as is mentioned in Sec. 5117, Rev. Statutes, is taken out of the scope and operation of Sec. 5106, Rev. Statutes, so far as to prevent the discharge of a bankrupt from imprisonment under the State laws on such debt.

This court also approves the position taken in the court below—that where the record disclosed a case of fraud, the court would not inquire beyond *the record* to call in question its verity in a Bankrupt Court.

Martin Alsberg was arrested by virtue of the State law, which authorized *capiases ad respondendum* in certain cases, that is, under circumstances of fraudulent and improper conduct on the part of the debtor mentioned in the act, and sworn to by the plaintiff.

The affidavit required by the law to be made as the foundation of the right to arrest is as follows: “That to the best of the plaintiff’s belief, the defendant has absconded, or is about to abscond, from the place of his usual abode,” or “that the defendant is justly indebted to the plaintiff in a sum exceeding fifty dollars, and that he verily believes the said defendant has secreted, conveyed away, assigned, settled or disposed of either money, goods, chattels, stock, securities for money or other personal estate, or real estate, of the value of more than one hundred dollars, with intent to defraud his creditors.” The plaintiff is moreover to specify and set forth in his affidavit the supposed fraudulent transactions. It is provided that this act shall not apply to cases for *libel, slander*, or injury to the person or property, accompanied by violence, if any affidavit of the cause of action be filed with the *præcipe*.

This act was passed at Dover, 1875, and was a modification of the law as it formerly stood, allowing *a capias ad respondendum* in all actions at law upon contracts, without any affidavit of fraud.

The *capiases* in these suits against the bankrupt were in due form. They did not allege and swear to debts contracted in fraud, or under any of the circumstances of fraud men-

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tioned in Section 5117 of the Rev. Statutes. They could not do so, for the grounds of arrest under the State law were not for such fraud as discharged the debts, yet in point of fact the debts may have been of that character. The arrests in these cases, then, supposing there had been no Act of Congress granting immunity to certain persons from such arrests, would have been in all respects legal and regular.

Section 5107 of the Rev. Statutes on Bankruptcy is in these words: "No bankrupt shall be liable, during the pendency of the proceedings in bankruptcy, to *arrest* in any civil *action*, unless the *same* is founded on some debt or claim from which his discharge in bankruptcy would not release him."

His privilege, or immunity, or exemption from arrest depends upon the fact of the debt being released by his discharge.

If it is unreleased he is *without* the immunity from arrest as provided for in this section as completely as if there had been no such provision in the Bankrupt Law.

It must be kept in mind that the power of arrest is a state power, a power not conferred by Act of Congress, and that the Bankrupt Act has conferred no such power, but has only interposed its shield to protect the bankrupt from arrest by State authority for a dischargeable debt, no matter how many fraudulent circumstances otherwise may surround it.

When the bankrupt is thus arrested by the authority of the State law and claims the immunity and privilege aforesaid, he must make it appear to the satisfaction of the court that his case comes within the exemption or privilege granted. If he does, he is discharged from arrest. If he *does not*, he is remanded to prison.

If he makes it appear that his debt is dischargeable, that is, that it is not tainted with any of the kinds of frauds enumerated in Sec. 5117, Rev. Statutes, which prevent its being released by the discharge of the bankrupt, he is within the exemption or privilege extended by Sec. 5107 of the Rev. Statutes. If he cannot do this, he is not within the privilege or exemption aforesaid, and must be remanded.

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In connection with this fraud the counsel for the petitioner who has been heard on this reargument has cited the following cases :

In re Rosenberg (2 N. B. R., 236); *In re* Migel (2 N. B. R., 481); *In re* Duncan (14 N. B. R., 18); *In re* Schwartz (15 N. B. R., 330).

In re Rosenberg, the bankrupt had been arrested, but was out on bail, and it was no part of the proceedings to have the bankrupt discharged from arrest, or his bail discharged; but it was to have the other proceedings of the suit, looking to the obtaining of a fraudulent judgment, stayed until the question of discharge in bankruptcy was settled. Hitherto it had been thought by some, among whom was Judge Blatchford himself, that the provisions to stay suits on provable claims did not apply to claims which were not released by discharge. Now this decision simply reverses that opinion, and permits a stay of proceedings. But the judge, in the close of his opinion, says: "I think it proper to say that this construction of the 21st Section has no application to the last clause of the 26th Section in regard to the liabilities of a bankrupt to arrest. By the specific provision of that clause (5107, Rev. Statutes) the bankrupt is entitled to be relieved from arrest if the arrest is founded on a debt from which his discharge, if granted, would release him, and this court is required, so long as the question of a discharge is undetermined, to *inquire if the arrest is founded on such debt.*" So that this case is a clear authority against discharging the prisoner when arrested under Section 5107, and the fact of the inability to be released from the debt is proven.

It is also authority as to the duty of the court to inquire into the latter fact "so long as the question of a discharge is undetermined."

In re Migel sustains precisely the same legal positions, with the exception that there was an express refusal to discharge the prisoner bankrupt. It is direct authority against the discharge of prisoner when arrested under Section 5107, and proof of the character of debt which prevents his release.

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In re Duncan (14 N. B. R., 18) has no bearing whatever on the right of the prisoner to immunity from arrest during proceedings in bankruptcy.

In re Henry Schwartz (15 N. B. R., 330) has no application to this case, touching the right of arrest.

In fact, no case has been adduced, and I doubt whether any case can be, restraining from arrest under the 5107th Section, Revised Statutes, where it is proved that the debt was not released by the discharge of the bankrupt.

But repeatedly such bankrupts have been remanded to prison.

The general order of the Supreme Court of the United States, prescribed for the government of proceedings in bankruptcy, has been cited as settling this question of immunity from arrest in favor of the prisoner. It is claimed that it amounts to an authoritative construction of the Supreme Court of the disputed provisions of the Bankrupt Act.

I do not think so. Judge Blatchford and Judge Nelson did not think so, and they decided that the rule was not intended to apply to cases where a bankrupt was arrested for a debt not discharged under Section 5107, Revised Statutes.

Indeed, this is the only rational construction which I think can be given to these apparently conflicting provisions. The result is that all parts of the act have efficacy given to them.

The result of the authorities is that, when a debt is provable, all actions against the debtor, pending proceedings in bankruptcy, shall be stayed, including arrests, with the exception that if the bankrupt has been arrested on a debt not dischargeable, he shall not be released from arrest by the Bankrupt Court.

We consider then that it is established beyond a doubt, that a bankrupt prisoner who has been arrested, pending proceedings in bankruptcy, for a debt contracted in fraud, cannot on a *habeas corpus* be released from such imprisonment.

The next question to be settled (and it was the second point made by the counsel for the petitioner) is: How is the court to determine the *question of fact* on which the petitioner's

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right to discharge, or the creditor's right to continue the imprisonment, depends? What is the evidence by which he is to be governed?

It will be seen that Section 5107, Revised Statutes, prescribes no rule of evidence by which the Court of Bankruptcy shall be guided in determining *the fact of the release of the debt on which the arrest is made*.

Upon some reflection, I have come to the conclusion clearly in my own mind, that it is the duty of the court to examine diligently all legal evidence brought before it from any quarter whatever, tending to show that a debt not dischargeable by the discharge of the bankrupt has or has not been contracted.

There is an apparent conflict of authority on this point.

For limiting the scope of inquiry may be cited Judge Blatchford and Judge Nelson, *In re Robinson*, already cited—Blatchford, *In re Abraham Valk* (3 N. B. R., 278). *In re Kimball* (2 N. B. R., 204), Judge Blatchford goes so far as to say: "This court only passes on the question whether the State Court has founded its arrest on a claim, which, on the face of the papers which were filed before it as the foundation for the arrest, is a claim from which the debtor would 'not be discharged in bankruptcy.'" Lowell, *In re Devoe* (2 N. B. R., p. 27), is for confining the evidence. *In re Migel*, Judge Blatchford takes the same view, and also *In re George W. Kimball* (1 N. B. R., 193). *In re Louis Glaser* (1 N. B. R., 336), Judge Blatchford thinks the case should be investigated by the court. He says "it is a disputed case, which cannot be decided on *ex parte* affidavits," and offers, "if the bankrupt desires it, to take testimony before a referee."

In re Williams & McPheeters (11 N. B. R., 145), Judge Drummond, Circuit Judge for the Western District of Wisconsin, says: "This objection seems to proceed on the theory that the complaint and facts stated therein, *i.e.*, in State proceedings, bound the Bankrupt Court. This is not correct, though it is true that the Bankrupt Law declares that the proceedings in bankruptcy shall not affect debts of a certain character, and among others those which have *their origin in fraud*, and

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further, the discharge of the bankrupt shall not operate as a release. It is to be observed that this is a question which the *Bankrupt Court has a right to determine, and that a statement in a declaration or complaint made by a party in a State Court does not bind the Bankrupt Court.*"

So that I consider this question an open one, to be decided on those principles which shall be in harmony with the intent and purpose of the Bankrupt Law.

The Bankrupt Law was meant to be uniform in its operation. Privileges are not to be accorded to either creditors or bankrupts in one district which are not equally extended to creditors and bankrupts in other districts.

The liability to imprisonment, or immunity from the same, depends on a fact. That fact is whether the debt for which he was arrested by State authority was dischargeable, or not, by the discharge in bankruptcy. I think it has nothing to do with the reasons or grounds of the arrest given in the affidavits upon which it was granted. It is manifest that Congress intended to punish this fraud where in fact it existed, and to prevent an arrest of the bankrupt for such debt not created in such fraud. If the position be correct, that the liability to arrest or discharge depends on the reasons given by the State authorities for the arrest, then there is no mode by which the creditors of the bankrupt can claim the benefit of the arrest granted by the Act of Congress, unless the reasons filed for the arrest consist of such acts of fraud as would, under the Act of Congress, prevent a discharge of the debt, and as in this State no such reason can be filed (as may also be the case in many other States), it follows that here (and in other States having like civil process) a bankrupt *may not be imprisoned* during proceedings in bankruptcy for a debt which is not discharged in bankruptcy, in defiance of Sec. 5117, Rev. Statutes United States, which permits it. Creditors *over* the district border, where reasons for arrest such as will discharge the debt can be filed, can have a hearing and continue the arrest if they prove their debt not dischargeable; while no such privilege can belong to the creditors in this district, because by the law of the State no such

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reasons or grounds of arrest can be sworn to, as will discharge the debt.

So, too, if this theory be correct, bankrupt prisoners in different districts may enjoy exemption from arrest, not as they prove their debts, on which they are imprisoned, are dischargeable in bankruptcy, but as their creditors may or may not be able to file reasons for their arrest which would, if true, make their debts undischageable in bankruptcy.

I think no such inequitable and partial results could have been contemplated by the framers of the Bankrupt Act, and hence conclude that when the liberty of the bankrupt is at stake, or the right of the creditor to arrest for a debt contracted in fraud, the question of discharge from arrest depends upon the determination of the act of fraud, and not upon the reasons which may have been filed in the State Courts for the arrest.

Where the liberty of the prisoner depends upon the fact that his debt is dischargeable by his discharge in bankruptcy, and he tenders proof to maintain the allegation, is it not a strange proposition that he shall be denied the right to prove his right to release from imprisonment because an *ex parte* affidavit had been made in the State Courts that he had contracted the debt under such circumstances of fraud as that his debt would not be released by his discharge in bankruptcy? This appears strange, because it affects the personal liberty of the bankrupt. But the rights of the creditors to arrest for debts not dischargeable in bankruptcy are equally sacred, and the proposition to me is equally strange that they should be denied the power to hold under arrest one legally arrested for other reasons filed than those which will release the debt, when they make the allegation, and offer to sustain it by proof, that the petitioner cannot bring himself within the exemption from arrest granted by Congress, by reason of the fact that the debt on which he was arrested was contracted in fraud.

And I think this view of the law is made apparent by the provisions of Secs. 760 and 761 of the Revised Statutes, in relation to the writ of *habeas corpus*.

Now, in the absence of directions as to the specific evidence

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required in the provisions of the Bankrupt Law, these sections appear to me to be conclusive on all questions of *prima facie* evidence made out by State proceedings—or the absence of evidence as to the sufficient grounds of arrest in the State proceedings.

“The petitioner may deny any of the facts set forth in the return, or may allege any other facts that may be *material* in the case.”

Surely he may *deny* that he has been arrested for a debt contracted in fraud, no matter what affidavits may have been made by State authority to the contrary, and surely he may allege that he has been arrested for a dischargeable or releaseable debt, though it does not appear from the State proceedings that he was arrested by reason of the debt being contracted in fraud. These sections render clear the duty of the court to hear all legal testimony in the cause, and go further; they permit “the return and all suggestions made against it” to be amended by the leave of the court, so that thereby the material facts may be ascertained.

The question of fact as to the creation of a debt not dischargeable by the discharge of the bankrupt, having been already passed on, it only remains for the Court to say that the motions to discharge and enjoin against any further proceedings are refused. As a stay of proceedings is not desired unless in connection with the discharge of the prisoner, no order is made in reference to that matter.

THEREUPON the bankrupt applied to the United States Circuit Court for the District of Delaware, to have said proceedings and orders supervised and set aside, and the bankrupt discharged from imprisonment, and for injunctions to restrain the plaintiffs in said writs from prosecuting their actions until the final determination of proceedings in bankruptcy.

The case was argued before Hon. William Strong, Justice of the Supreme Court of the United States, who rendered his decision, June 29, 1877, as follows:

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STRONG, J.—After argument and consideration, it is ordered that the action of the District Court be approved, and this petition is dismissed.

UNITED STATES DISTRICT COURT—W. D. MICHIGAN.

AUGUST 4, 1877.

In the absence of consent by creditors in voluntary cases, no matter when commenced nor when the debts were contracted, the assets must pay thirty per cent., or there can be no discharge.

In compulsory cases, if otherwise entitled thereto, the bankrupt is entitled to a discharge irrespective of the assent of creditors or the amount of his assets.

In re HAVILAND GIFFORD.

Arthur Brown, for bankrupt.

Edwards & Sherwood, for creditor.

WITHEY, J.—Sept. 26, 1876, a voluntary petition was filed and an adjudication followed. Debts have been proved upon which the bankrupt is liable as principal debtor, all contracted prior to January, 1869. There were no assets. Under such a state of facts a discharge is asked. The law now in force applicable to the question is the 9th Section of the act of June 22, 1874, which declares: "In cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value; and the provision in Section 33 of the act of March second, eighteen hundred and sixty-seven, requiring fifty per centum of such assets, is hereby repealed." Section 21 of the same act repeals all acts and parts of acts inconsistent with the provisions of this act.

Nevertheless, it is contended for the bankrupt that the previous condition of the law, which gave a discharge as to all

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debts contracted prior to 1869, whether the assets pay anything or not, entitles this applicant to a discharge. (Original Sec. 33, 14 Stat., 533—Amendment of 1868, 15 Stat., 227, Sec. 1—Additional Amendment of 1870, 16 Stat., 276, Sec. 1.)

We know of no decided case that sustains such proposition, and if any was cited we could not follow it unless it was rendered by a court whose decision would be binding on this court. *In re* Sheldon (12 N. B. R., 63) is cited; also *In re* Francke (10 N. B. R., 438). In both those cases the petition and adjudication were prior to the passage of the act of June 22, 1874, and it was therefore held they were governed, as to the question of discharge, by the condition of the law as it existed prior to the change in 1874.

First, We have to say that the cases, if correctly decided, are not applicable or authority in the case at bar. They were cases pending prior to the passage of the act of 1874, and therefore held not to be governed by it. This case was commenced subsequent to the enactment of 1874, and therefore is governed by it.

Second, Mr. Justice Miller, at the Circuit (*In re* King, 1 Cent. Law Journal, p. 506), holds the opposite view to that expressed by Judge Blatchford. (See also Judge Lowell, *In re* Griffiths, *ibid.*, p. 507.) The cases referred to were all involuntary, but the point decided in each is alike applicable to voluntary cases. It is simply a question as to the application of a remedial statute. We fully agree with the views expressed in the last-named two cases. The act of 1874 governs in both voluntary and involuntary cases. As to involuntary cases we have so held in several instances, in none of which has an opinion been written.

As the law now stands we hold that in the absence of consent by creditors in voluntary cases, no matter when commenced nor when debts were contracted, the assets must pay thirty per cent., not fifty per cent., or there can be no discharge; whereas in compulsory cases the bankrupt, if otherwise entitled thereto, is entitled to a discharge irrespective of the assent of creditors or the amount of his assets.

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We have prepared this brief opinion in order to promulgate the conclusions of this court on the questions and points stated, and thus avoid having them again argued before us.

UNITED STATES DISTRICT COURT—OREGON.

JULY 24, 1877.

The lien given by Section 266 of the Oregon civil code upon the docket of a judgment arises from the docket and not the judgment; it is a strict legal right and must stand or fall by the statute which gives it.

The docket entry is not a part of the judicial proceeding which ends with the entry of judgment, and therefore such entry cannot be referred to for the purpose of supplying omissions or explaining ambiguities in the docket; but the latter must be complete in itself.

A judgment which by its terms cannot be enforced against the property of a party cannot become a lien thereon.

In re HAMILTON BOYD, Bankrupt.

John Catlin, for the assignee.

William H. Effinger and *G. W. Yocum*, for the creditors.

DEADY, J.—The questions arising upon the objections to these proofs of debt were heard and submitted together, and will be so disposed of.

On March 2, 1876, Ira Goodnough obtained judgment in the Circuit Court of the State for the county of Multnomah against said bankrupt and A. H. Johnson, for the sum of seven thousand eight hundred and seventy-five dollars in gold coin, with interest on five thousand five hundred dollars of the same from January 5, 1876, at one per centum per month in like coin, and fourteen dollars and eighty cents costs and disbursements. Said judgment was given upon a promissory note made by said bankrupt and Johnson—the latter being, in fact, a surety thereon.

On the same day this judgment was given, an entry was made in the "Judgment Docket" of said Circuit Court, under appropriate heads, of the date of said judgment, the names of

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the parties thereto, the date of such entry, and under the head of "Amount of Judgment," the following—"Costs 14 80 : Face 7875 00"—without any dollar mark or other sign or word to signify or indicate what was the denomination of these figures or what they represented. The entry also contains a head just following the last named, entitled, "Rate of Interest"—under which is written the word "Coin." On the right hand of the docket are three columns, headed respectively—"Appeals, When Taken ;" "Judgment of Appellate Court ;" and "Satisfaction, When Entered," as provided in Section 562 of the Code of C. P. Under these heads and across these columns is written—"Int. on \$7,500 part thereof at 1 per cent. per mo. from Jan. 5, 1876."

On March 3, 1876, Boyd filed his petition in bankruptcy in this court, upon which he was afterwards duly adjudged a bankrupt. On October 4, 1876, Goodnough proved said judgment as a secured debt against Boyd's estate, claiming therein to have a lien by virtue of the docketing of said judgment upon all the real property of the bankrupt within the county. The assignee objected to said proof of debt—the objections being : (1) That said judgment was taken and procured in fraud of the Bankrupt Act ; and (2) that said proof is not sufficient as proof of a secured debt, because said judgment was never duly docketed so as to become a lien upon the bankrupt's property.

The creditor answered the objections and the matter was heard before the register who found for the creditor upon the first objection and for the assignee upon the second. The question—Whether the ruling of the register should stand ?—was then, at the request of counsel, certified into court and argued by counsel.

At common law a judgment for a debt or damages could only be enforced against the goods and chattels and the present profits of the lands of the debtor. But the possession of the lands could not be reached. Afterwards the statutes of Westminster 2, 13 Ed. I., Ch. 18 (2 Inst., 394), gave the creditor the option to take a moiety of the debtor's land upon an *elegit*, to hold until the rents and profits would satisfy the judgment ;

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and thereupon it was said that the judgment was a lien upon such lands. (3 Black. Com., 418; *U. S. v. Morrison*, 4 Pet., 135; *Bank of U. S. v. Winston's Executors*, 2 Brock., 253; *Masingill v. Downs*, 7 How., 765; *Shrew v. Jones*, 2 McLean, 79.) But this lien only conferred a right to levy upon the land within a year and a day from the rendition of the judgment, to the exclusion of adverse interest therein, acquired subsequently to such judgment; yet when such levy was actually made, it related back to the date of the judgment, so as to exclude all intermediate encumbrances. But subject to this, the judgment debtor had full power to dispose of his property, notwithstanding the judgment. The judgment creditor acquired no *jus in re*, but only a mere power to make his general lien or privilege specific and effectual by an execution and levy upon the property of his debtor. (*Conrad v. The Atlantic Ins. Co.*, 1 Pet., 443.)

Now, the modern statute lien of a judgment, as provided in Sections 266-7-8 of the Or. Civ. Code, is altogether different from this.

In the latter case, the lien arises not from the judgment, but the docket thereof. Without the entry in the docket there is no lien. Neither is this statute lien contingent upon the issuing of an execution and a levy. It is absolute—even against a conveyance of the same premises by the judgment debtor. Being a creature of the statute, and not an incident or consequence of the judgment, its existence and validity depend upon a docket entry in conformity with the statute. It is a strict legal right or advantage, and must stand or fall by the statute which gives it. (*Miami Ex. Co. v. Turpin*, 3 Ohio, 514; *Douglass v. Huston*, 6 Ohio, 162; *Buchan v. Sumner*, 2 Barb. Ch., 195; *Isaac v. Swift*, 10 Cal., 81; *Ackley v. Chamberlain*, 16 Cal., 183; *Bowman v. Norton*, id., 221.)

True, there must be a valid judgment behind the docket, or it will be of no avail. But, nevertheless, the docket is no part of the judgment or action in which it was given. The docket may be made in every county in the State, and a lien

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thereby created upon all the lands of the judgment debtor therein. The judicial proceeding, which commences with the filing of the complaint, ends with the entry of judgment therein. The docketing of the same is something apart and collateral. It is the ministerial act of the clerk, and may, if the law should so provide, be as well done in the office of a recorder or other place where a record of deeds and other transactions affecting real property is made and preserved, as in the clerk's office. Therefore, a defective, ambiguous, or insufficient docket cannot be aided by a reference to the judgment or other proceedings in the action. To create the lien, the docket must be complete in itself—must impart all the information which the statute contemplates, without reference to any proceeding which has gone before. Neither is it a mere index or notice to look elsewhere. But it is an independent record of particular facts, authorized for the special purpose of creating and fastening a lien upon the real property of the judgment debtor against all parties subsequent in interest, and therefore must be complete in itself, or it is without effect. Nor is the entry in the docket intended to be a mere notice of an existing and antecedent fact—the judgment. True, the entry must contain certain facts, which presuppose a corresponding judgment. But the direct and ultimate purpose of the entry is not to give notice of the judgment, but to produce a certain legal effect, to wit: a lien upon the real property of the judgment debtor within the county. Therefore, the authorities cited by the counsel for the creditor—*Fowler v. Doyle* (16 Iowa, 534); *Delevan v. Pratt* (19 Iowa, 431); *Markham v. Buckingham* (21 Iowa, 496); and *Carr v. Anderson* (24 Miss., 188), which hold that when the judgment entry is obscure or imperfect it may be read in the light of the pleadings and prior proceedings in the case, are not in point. Besides, these cases trench upon, if they do not belong to the class which are said to “make bad precedents,” and to be “the quicksands of the law.”

Conceding, then, that this docket entry must stand or fall by itself, it is insufficient upon both reason and authority.

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The *amount* of the judgment—the thing, number, or value of that which the plaintiff is thereby shown to be entitled to recover off or from the defendant therein—does not appear. This is one of the essentials of the entry. The figures under the head—“Amount of Judgment”—14 80 and 7875 00, do not indicate anything but abstract numbers. As was well said by Mr. Justice Sawyer, upon a similar question in *People v. S. F. Savings Union* (31 Cal., 136)—“They are simply numerals—‘barren figures’—that are as often employed to indicate anything else that may be numbered as dollars; or if money is indicated, the denominations may be either eagles, dollars, cents or mills.” To the same effect is the ruling in *Hurlbut v. Butenop* (27 Cal., 56); *Tilton v. O. C. M. R. Co.* (3 Saw., 24); *Lawrence v. Fast* (20 Ill., 341); and *Lane v. Bommelman* (21 Ill., 147). In the last two cases it was held that a judgment for taxes upon an assessment which, in the valuation column, contained only abstract numbers without any mark or word to indicate whether they were intended for dollars, cents, or mills, was void for uncertainty. The ruling in these cases was followed by the Supreme Court of the United States in *Woods v. Freeman* (1 Wall., 399)—a case, it is true, from Illinois—but without a doubt or suggestion as to its correctness. In *Buchan v. Sumner*, supra, it was held that the docket of a judgment, in which the Christian name of the judgment debtor was used for the surname, and *vice versa*, that the entry was therefore void and of no effect.

Again, it appearing from the proof of debt that this judgment was given for *gold coin*, it would seem that it should have been so docketed. In a very material sense, the “amount” or value of a judgment depends upon the kind of money for which it is given and with which it may be satisfied. This entry contains a column and head not authorized by the statute, namely—“Rate of Interest” under which the word “Coin” is written, but nothing concerning the *rate* of interest. The *interest* which a judgment bears is a part of the *amount* of it—and in time may become the most material part of it—and therefore it seems that the rate and kind of money in which it

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is payable are proper, if not essential parts of the docket entry under the head—"Amount of Judgment." In providing for the docketing of a judgment, the Code (Section 266) does not specify what particulars it shall contain. But Section 562 of the same, which describes the "Judgment Docket" itself, provides into how many columns the pages of the same shall be divided, and how such columns shall be headed. One of these is—"Amount of Judgment." Under this head it would seem, from the very nature of the case and the prime purpose of the proceeding, there ought to be stated every fact which enters into the value or amount of the judgment, and thereby affects the extent of the lien, which it is the sole object of the entry to create and preserve. Of these facts, in case of a money judgment, the most material are the number and denomination or kind of moneys for which the judgment is given, and the rate of interest and kind of money in which it is payable.

It has been suggested that the entry running across the last three columns of the docket—"Int. on seven thousand five hundred dollars part thereof at 1 per cent. per mo. from Jan. 5, 1876," reflects light upon the figures in the column headed—"Amount of Judgment," and shows that they were intended to indicate dollars. Assuming that this entry is a legal and proper statement of the fact that seven thousand five hundred *dollars* is a "part thereof"—the question recurs—a *part* of what?—the judgment? Let the answer be in the affirmative; still it don't show *what* part of the judgment—whether a third, a fourth, or a fifth. The whole of an amount cannot be inferred or ascertained from a part being given, unless the proportion which such part bears to the whole is also given. Because seven thousand five hundred *dollars* is said to be a *part* of a judgment, the whole amount of which is represented by the abstract numerals 14 80 and 7875 00, it by no means follows that the amount of such judgment is only seven thousand eight hundred and seventy-five *dollars* rather than as many *eagles* or any other known denomination of money greater than dollars. If the entry had said, seven thousand five hundred *cents* was a *part* of the judgment, by this mode of reasoning

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it would follow that the *whole* judgment was only seven thousand eight hundred and seventy-five cents.

But another conclusive answer to this suggestion is found in the fact that this entry as to the "part thereof" is unauthorized and void, and therefore of no effect. The facts concerning the "amount" of the judgment must appear in the column designated for that purpose.

The judgment, instead of being given, as it should have been, for the principal and interest then due upon the note, with provision that that sum should be recovered with the rate of interest mentioned in the note, seems to have been given for such sum, and then provision was made that "a part thereof"—seven thousand five hundred dollars—should bear interest from a time anterior to the date of the judgment, to wit, the date of the note, and hence this entry in the docket.

A judgment is properly given for the debt and damages—the principal and interest—the whole sum then due. This is a merger of the debt, and thereafter such judgment bears interest or not, and at such rate as the statute may provide. (*Clark v. Goodwin*, 14 Mass., 239; *Otis v. Wood*, 3 Wend., 494.)

In considering the question of the sufficiency of this docket, it must be borne in mind that there is no equity upon the part of the creditor which suggests or requires that the court should strain a point to uphold this alleged lien. The lien acquired by a judgment creditor upon the proper docketing of his judgment is an advantage—a preference over other creditors. It is a strict legal right, and must stand or fall by the statute which gives it.

This is a controversy between a creditor seeking to establish a legal preference, and the assignee representing other creditors equally as meritorious as he. In such a controversy there are no equities in favor of the alleged preference, but the contrary.

The question whether the judgment is invalid because taken contrary to the Bankrupt Act was not discussed by counsel for the assignee, and the ruling of the register upon this point is affirmed, *pro forma*. If the judgment is not a lien, the creditor obtained no preference by it, and therefore it cannot be said to be obnoxious to the act.

In re Boyd.

On October 20, 1876, the Bank of British Columbia proved, as a secured debt, against Boyd's estate, a judgment given against said bankrupt and Johnson in the Circuit Court aforesaid on March 2, 1876, for the sum of five thousand dollars in gold coin, with interest thereon at the rate of one per cent. per month from January 27, 1876, and fourteen dollars and eighty cents costs and disbursements, and alleged to have been docketed at the same time. The same proceedings took place before the register in regard to this proof as in that of Goodnough's, with the same results.

An additional objection, however, was made by the assignee to this proof—that the judgment in favor of the bank was not such as could be enforced against Boyd or his individual property. The judgment in question was given for want of an answer, and provides that the bank *recover* off both Boyd and Johnson the sum stated, and then provides that “the plaintiff do have execution against the property of said Johnson and against the joint property of said Boyd and Johnson to enforce this judgment.”

A judgment entry is sufficient without any provision concerning its enforcement, which is regulated by law, unless it be in the case of defendants jointly indebted but not all served, as provided in Section 59 of the Code. In this case both defendants were served, though the entry would indicate that only Johnson was. But it seems reasonable that any restriction or condition that a court may impose upon the enforcement of a judgment by a provision in the entry of the same, must be taken to be a part of its action in giving the judgment. If the effect is to modify or even nullify the right to recover, it can only be said that so far the court has not given any judgment. A judgment that A recover one thousand dollars off B, containing a provision that no execution shall issue to enforce the same, may be evidence of a debt, but it is not a judgment that can become a lien upon the property of B; because Section 266 of the Code does not make any judgment a lien by reason of the docket entry thereof, *only* “during the time an execution may issue thereon.”

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Assuming this to be the law of the case, there is no judgment here against Boyd individually, but only one against Johnson and Boyd. But this cannot be enforced against Boyd individually, and therefore it cannot be made a lien upon his individual property. There being no sufficient proper docket entry of either judgment, neither of them became a lien upon the property of the bankrupt; nor is there any judgment in the case of the bank against the bankrupt, individually. Therefore the proof of debt by Goodnough is allowed to stand as proof of an unsecured debt for the full amount of the judgment on the day of the filing the petition in bankruptcy; and the proof of debt by the bank is allowed to stand as proof of an unsecured debt for the sum due upon its note on the same day.

COURT OF APPEALS—VIRGINIA.

DECEMBER 19, 1876.

A creditor having a lien upon the bankrupt's estate may decline to appear in the Bankrupt Court, in which case he will be unaffected by the proceedings unless the proper steps are taken to sell the estate clear of all incumbrances; or he may elect to prove his debt in the bankruptcy proceedings and rely upon his security, and such action will be a waiver of his right to institute any suit or proceeding in any way inconsistent with such election.

An objection that the purchaser at a sale made by the assignee in bankruptcy was the attorney for the assignee, and as such was incapable of purchasing, cannot be raised in a collateral action, but must be made in the Bankrupt Court.

SPILMAN v. JOHNSON.

This was a suit in equity in the Circuit Court of Henrico County, brought in June, 1871, by Luther R. Spilman, against Bradley T. Johnson, John Johns, and others, to subject certain land, called the "Granite Quarry," in the county of Henrico, purchased by Johnson at a public sale made by John Johns, assignee of Henry Exall, a bankrupt, to the lien of two judgments which had been recovered against said Exall, some years before

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his bankruptcy, one of them by B. W. Green, and the other by Taylor & Son, and which had been assigned to Spilman. This cause came on to be heard on the 18th of June, 1872, when the Court made a decree dismissing the bill, with costs. And thereupon Spilman applied to this Court for an appeal; which was allowed. The cause is stated by Judge Staples in his opinion.

Guy & Gilliam, for the appellant.

Royall, for the appellees.

STAPLES, J.—It is claimed by the appellant that the property known as the “Granite Quarry,” in the possession of the appellee Johnson, was sold under a decree of the Circuit Court of the United States; that the suit in which that decree was rendered was brought not for the purpose of procuring a sale, but merely to vacate as fraudulent the lease made to Turner Exall; that he, the appellant, was not a party to that suit; that he had no connection with it; and he received no part of the purchase money. The exhibits filed fully sustain the appellant in these positions. And if this was the whole case, the lien of his judgments would still be in force, and he might properly invoke the jurisdiction of the State Courts to enforce the same against the property in the possession of the appellee. But unfortunately for him this is not the whole case. There are other facts to be considered which conclusively show that the appellant has waived his right to assert this lien by any proceeding or suit in a State Court. In order to understand this more clearly, it is proper to inquire into the proceedings in the Bankrupt Court. In October, 1868, the assignee filed his petition in that Court, setting forth the real estate belonging to Exall, the bankrupt, the number and amount of the liens thereon, the parties entitled to the same, and asking for a sale of the property, discharged of all the incumbrances. Several of the judgment creditors united in this petition. Among those so uniting were the creditors under whom the appellant now claims. A decree of sale was accordingly made. Subsequently the assignee filed his bill in the Circuit Court of the United States to vacate the lease to

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Turner Exall as fraudulent. A decree was entered vacating the lease, and directing a sale of the "Granite Quarry." The property was advertised accordingly, but the sale was enjoined by Armistead & Cary, creditors, claiming to have a lien upon it for money expended or advanced in developing the quarry. This injunction was awarded by the Hon. John C. Underwood, as judge of the District Court, to whom the application was addressed. The decree of sale was set aside by him, and a rehearing of the cause directed at an adjourned term of the Circuit Court of the United States. Afterwards the same judge, sitting in the Circuit Court, however, rendered a decree for the sale of the property, and under that decree the sale was made, at which the appellee became the purchaser.

It would thus seem the various orders and decrees were uniformly entered by the same judge, presiding indifferently in the Circuit Court and in the District Court.

And although the assignee proposed to sell under a decree of the Circuit Court, he had at the same time the authority of the District Court sitting in bankruptcy, conferred by the decree of the 12th October, 1868, already adverted to. His reports of the sales were both returned to, and filed in the latter Court.

These reports distinctly set forth the names of the several purchasers, the amount of the purchase money, the charges, costs, fees attending the sales, and the balance remaining in the hands of the assignee for distribution among the creditors.

It further appears that on motion of John P. Tabb, a preferred creditor, after the reports were so filed, an order was entered in the Bankrupt Court for an account of the liens upon the estate of the bankrupt and their respective priorities. The Special Commissioner, O. G. Kean, appointed for that purpose, notified the creditors that he would take the account on the 9th November, 1870, and that to enable them to share in the distribution *their liens must be asserted in the bankrupt suit*. This notice was served on the appellant, and on the day indicated he, as assignee of B. W. Green, proved his debt as a secured creditor, claiming a lien on the real estate and upon the proceeds of sale in the hands of the assignee. The other judgment held

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by the appellant, as assignee of William Taylor & Sons, had been previously proved by the latter before the assignment was made. Three months after this, in January, 1871, the following order was entered: "It appearing from the report of the assignee in this cause that there is in his hands, after the payment of all expenses incurred by him in this suit, the sum of one thousand five hundred and seventy-seven dollars and seventy-nine cents, one-half of which was derived from the sale of the realty, and the other half from the sale of the personalty, it is ordered that John Johns, said assignee, do distribute said fund to the parties entitled to the same as ascertained by the report of O. G. Kean, special master, filed herein, respect being had to the priorities declared to exist among them by said report; that is to say seven hundred and eighty-eight dollars and eighty-nine cents to those holding liens upon the realty, and seven hundred and eighty-eight dollars and eighty-nine cents to those holding liens upon the personalty, after deducting the one hundred dollars due to the laborers, and the thirty-six dollars to the United States, as a joint charge on the two funds and the Register's fees." This order is signed by W. W. Forbes, Register. It was asserted in the argument, and it was not controverted, that it is the practice in the Bankrupt Courts for the Register to enter orders for distribution of the assets where there is no controversy. If a party is dissatisfied with the ruling, an appeal is taken to the Court for the correction of the errors. It is laid down in the books on bankruptcy that, while the register is subject to the control and supervision of the Court, it is, nevertheless, competent for him to convene the creditors, declare dividends and make distribution of the assets. Bump on Bankruptcy, 64. However this be, the order in question is proved to be in the handwriting of the appellant. The fair inference is that it was signed by the Register at his suggestion. The language of the order plainly shows that the appellant was well acquainted with the reports made by the assignee.

These reports showed that the Granite Quarry was sold under a decree of the Circuit Court, and not of the Bankrupt Court; that the greater part of the funds in the hands of the assignee

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was derived from the sale of that property to the appellee, General Johnson.

With all this knowledge, the appellant prepares an order for its distribution among the lien creditors according to their priorities, he being an assignee of two of the judgments named in the report of the Commissioner. But this is not all. The papers of the Bankrupt Court show that the appellant contested the liens of four of the creditors; that he filed exceptions to the report of Commissioner Kean; and that on the 24th of January, 1871, he objected to the discharge of the assignee for various reasons, which were overruled by the Register, and he took no appeal. It thus appears, that the appellant not only proved his debt and asserted his lien in the Bankrupt Court, but he actively participated as a party in the proceedings at every step of the adjudication. A creditor having a lien upon the estate of his bankrupt debtor has two courses open to him, either of which he may adopt. He may decline to appear in the Bankrupt Court, and he will, of course, be unaffected by any proceeding in that Court, unless, indeed, the proper steps are taken to sell the estate clear of all encumbrances; or, the creditors may elect to proceed in the Bankrupt Court, prove his debt there, and rely upon his security.

Should he adopt the latter course, it is an election to proceed in the Bankrupt Court, and a waiver of his right to institute any suit or proceeding at law or in equity which is in any way inconsistent with his election to obtain satisfaction of the debt under the bankruptcy proceedings. This principle is well settled. (Bump on Bankruptcy, page 78; *Wilson v. Capuro*, 4 N. B. R., 714, 41 Cal. R., 345; *Hoyt v. Freel*, 4 N. B. R., 132, 8 Abb. Pr., N. S., 220; *Haxtun v. Corse*, 2 Bar. Ch., 506.) The only cases cited for the appellant, as holding a contrary view is that of *Re Brand*, decided by Jackson, J., and published in 3 N. B. R., 324. That was, however, a case arising in a Bankrupt Court, and the question was as to the mode of administering the assets in that Court. Here the question is, whether a creditor, having elected to assert his lien in a Bankrupt Court, having made himself a party to the pro-

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ceedings in that Court, can afterwards resort to a state tribunal to enforce his lien against the same property which was the subject of adjudication in the Bankrupt Court. According to the Virginia practice, a creditor may go into a Court of Equity to enforce his lien; other creditors having liens may come in by petition, or, when there is a decree for an account, they may prove before a commissioner. In either case they are considered parties to the suit, and are bound by the proceedings. Will it be maintained that a creditor thus coming in, proving his debt, excepting to commissioner's reports, contesting the liens of other creditors, and in every way identifying himself with the case, is at liberty to resort to another court for the assertion of the same lien against the property in the hands of a *bona fide* purchaser.

This principle applies very strongly to the District Court of the United States, which, in matters of bankruptcy, has exclusive jurisdiction in adjudicating the rights of creditors, liquidating liens, settling conflicting claims to priority, and in distributing the assets of the bankrupt. If the creditor fails to realize here what is justly due him, it is not for the want of power in the Bankrupt Court to afford relief, but because of some error or mismanagement in the conduct of the cause, to be corrected by the court itself or some other tribunal having appellate jurisdiction over that court. It is no doubt true that the appellant failed to receive any part of the fund. Whether he was rightfully excluded it is impossible for this court to undertake to decide. The report of Commissioner Kean, to which appellant excepted, shows there were liens prior to those of the appellant, amounting to fifteen or eighteen hundred dollars, probably more than sufficient to absorb the entire fund. The result would perhaps have been different if appellant's exceptions had been sustained. If any error was committed to the prejudice of the judgment creditors of the bankrupt, it was in the decree sustaining the claim of Armistead & Cary. This claim was strongly contested by the assignee, but was approved by a judge of the District Court, and allowed by a judge of the Circuit Court.

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With the lights before us, how can we review this decision? By what authority can we pass upon it at all. All that can be said is, if the claim was just and valid, the appellant is not prejudiced, and under no state of circumstances could he ever have realized any part of his judgments. The reason is, that this claim and the prior judgments would have left nothing for the satisfaction of the appellant's judgments. On the other hand, if the claim of Armistead & Cary was not just, if the decrees allowing it are erroneous, the remedy, if any, was by application to the Bankrupt Court to interfere, or by appeal to the proper Appellate Court to correct its error. The decision of Chief Justice Wait in *Re Taliaferro*, cited by the appellant, is authority for this proposition. That was an appeal to the Circuit Court from erroneous orders and decrees of the Bankrupt Court, and plainly indicates the course the appellant ought to have pursued in this case. If the appellant is not bound by the proceedings in the Bankrupt Court, neither are the other creditors. If he may institute a separate suit, so may each one of them. But this will scarcely be claimed. In any event, all the creditors having liens ought to be before the court, in order that all conflicting claims and questions of priority may be settled in one suit, and the purchaser quieted in his possession and title. If William Sutton & Co., and Armistead & Cary, were justly entitled to priority over the appellant, the appellee, whose money paid those debts, ought to have credit for the amount. He is clearly entitled to be subrogated to the rights of those creditors. In effect, this Court, or the Court below, must re-open the proceedings in bankruptcy, revise the decisions of that Court, and proceed to administer the assets of the bankrupt. The statement of the proposition is its own refutation. There is nothing in the record before us casting the least suspicion of unfairness upon the appellee. He appears to have been a *bona fide* purchaser at a public sale. He complied with all the terms by paying the several instalments of the purchase money.

If the property was sold at a sacrifice, there is nothing to show it. If the proceeds of sale were mis-applied, there is

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nothing to connect the appellee with it. It was said in the argument, although no issue of the kind is made in the pleadings, that the appellee was the attorney of the assignee, and as such he was incapable of purchasing at a sale made by the assignee.

If there is anything in the objection, it ought to have been made in the Bankrupt Court; and not in this collateral way in another court. That question has been effectually settled by repeated adjudications of this Court. See *Cline v. Catron*, 22 Gratt., 378, where the authorities are cited. Upon the whole, for the reasons stated, I am of opinion the decree of the Circuit Court is correct, and must be affirmed.

The other judges concurred.

Decree affirmed.

UNITED STATES DISTRICT COURT—W. D. MICHIGAN.

AUGUST 10, 1877.

If a bankrupt honestly regards a judgment held by him as worthless, he is not chargeable with false swearing or fraud if he omit it from his schedule. Even if it has value as an asset, and he considers it as having value, still its omission must be intentional in order to charge him with false swearing or fraud.

A merchant or trader who, prior to his becoming such, has kept books of account showing the state of his affairs, is not required to carry their contents or any part of them into his books opened and kept as a trader, in order to satisfy the requirement of the statute as to a bankrupt keeping proper books of account while he is a merchant or tradesman.

Keeping proper books of account, within the meaning of the Bankrupt Act, is the keeping of an intelligent record of the merchant's or tradesman's affairs, and with that reasonable degree of accuracy and care which is to be expected from an intelligent man in that business, and a casual mistake therein will not prevent a discharge.

It is not required that a chattel mortgage given to secure a debt shall be entered upon the merchant's or trader's books. An entry of notes upon the fly-leaf of the blotter is sufficient.

In re ZENAS G. WINSOR.

J. W. Champlin, for the bankrupt.

Mr. Fletcher and *Mr. Smiley*, opposed.

WITHEY, J.—Fifteen grounds of opposition to the bankrupt's discharge are stated in the specifications of three opposing

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creditors, and cover all the grounds alleged by other creditors. It is necessary to notice but four in deciding the case, viz. : specifications 2, 3, 13 and 15. One and fourteen were abandoned, and three embraces in substance all that is alleged by four to twelve, inclusive.

The second specification alleges wilful and false swearing by the bankrupt in his oath to Schedule "D;" also wilful and fraudulent omission of an asset from the schedule. The evidence is, that one Butler, in 1868, obtained judgment in the State Court against Jacob W. and Eugene E. Winsor, which in May, 1874, was assigned to the bankrupt. At the time of the bankruptcy, this judgment remained unsatisfied, and has not been scheduled as an asset. It also appears that Jacob W. Winsor died some time before the proceedings in bankruptcy were commenced, his estate being utterly insolvent. The other judgment debtor is irresponsible. The bankrupt testifies that the reason the judgment was not scheduled among his assets was because it never occurred to him to place it there. He seems to have considered it worthless and of no consequence before his bankruptcy.

Eugene E. had entered into the obligation on which the judgment was recovered at the instance of the bankrupt, and on the understanding that he was to be saved harmless. The bankrupt did not consider that he had any just claim against Eugene, in view of that understanding.

The facts do not sustain the charge that the bankrupt took a wilful, false oath, or that he fraudulently omitted the judgment from his schedule.

If the bankrupt honestly regarded the judgment worthless, he might omit it from the schedule without being chargeable with false swearing or fraud. If it had value as an asset, and was considered by the bankrupt as having value, still there was neither a wilful false swearing nor fraud unless the omission to place the judgment in the schedule was intentional.

The third specification alleges that the bankrupt, being a merchant and tradesman, failed to keep proper books of account, in not having entered a debt owing to one of his children.

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Four other specifications allege the same thing as to four other children.

The facts disclose that in 1865, the bankrupt held in trust land for his five children, which he sold for some fourteen thousand dollars and appropriated the money to his own use. This mis-appropriation occurred before the bankrupt engaged in trade. At the time of the sale of the land he entered the transaction in his then books of account. Six months or more before the petition in bankruptcy was filed, those books were destroyed by an accidental fire which consumed a building in which they were kept. When he went into trade in 1870 or 1871, the bankrupt opened books of accounts appertaining to his business as a trader, but did not transfer to them any of the transactions entered in the books of account which he had kept for fifteen years previously.

The Bankrupt Law declares that "no discharge shall be granted, or, if granted, be valid, if, being a merchant or tradesman, he has not subsequent to the passage of this act, kept proper books of account." The question is, does this provision require the books of account kept by a trader as such, to contain entries of debts owed by him at the time he went into trade, previously contracted, as well as of those debts incurred in his business as a trader. The statute relates to the bankrupt while a merchant or trader, and, as we understand, visits upon him the penalty of being refused a discharge from his debts, if while a trader he did not keep proper books of account. The statute should be so construed as to carry out the intention of Congress. A trader must be held to the utmost good faith in keeping his accounts, to the end that his assignee in bankruptcy or any competent person may be able from his books to ascertain the state of the bankrupt's business while a trader. But if, prior to becoming a trader, he kept books of account which exhibited the state of his affairs, their contents, nor any part of them, need not be carried into his books opened and kept as a trader in order to satisfy the provision of the statute as to a bankrupt keeping proper books of account during the time he is a merchant or a tradesman. The law requires no

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books of account to be kept by any one as a condition precedent to obtaining a discharge other than those who, being merchants or tradesmen, become bankrupt. Had the books kept by Winsor prior to his entering into trade not been destroyed and they been turned over to the assignee, it is obvious that the ground of opposition we are considering could not successfully have been urged, and the accident that destroyed those books ought not, therefore, to be made the circumstance for visiting upon him the penalty of being denied a discharge. We find that specifications three to twelve inclusive are not sustained.

The thirteenth specification involves the same clause of the statute as that last considered, but is too indefinite to constitute a ground of opposition; nevertheless we will consider it. The charge is that the bankrupt did not enter in his books of account "a large real estate transaction with one E. P. Ferry."

The evidence shows that the transaction complained of was entered on page 510 of the blotter kept by the bankrupt as a trader, fully disclosing his indebtedness in relation thereto. We might, therefore, without further comment, dispose of this specification.

But in the course of the trial, by reference to the schedule of debts, it appeared that subsequent to the real estate transaction the bankrupt gave to Ferry two notes of two thousand five hundred dollars each to cover the indebtedness growing out of that transaction, and these notes were not entered in the books of account.

The specification charges that the bankrupt "had large real estate transactions with one E. P. Ferry, of Grand Haven, Michigan, of which he kept no record in his books of account."

Now, suppose, by a liberal construction, the subsequent giving of the notes should be considered as part of the "real estate transaction," and covered by the pleading, or assuming that the Court is not to grant a discharge if it appears the bankrupt has not kept proper books of account, whether such omission is pleaded or not, what conclusion should be reached? The evidence shows that the bankrupt's books purported to contain an account of his bills payable. He testified that he

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had supposed, until his attention was called to the omission, his books did contain entries of all his bills payable, that his practice was to enter them in his books of account.

Now, the mere fact that they were not entirely accurate, or that items of his business were occasionally omitted from his books, ought not, standing alone, to be regarded as evidence that he did not keep proper books of account within the meaning of the Bankrupt Law, unless "*proper*" means *accurate* books of account; and if the latter is to be the interpretation of the statute, we venture to assert there will thereafter be few if any discharges of bankrupt traders.

It was urged that intentions and good faith are not to be considered in determining whether proper books of account have been kept. Such is the rule to be applied when no account of cash, of merchandise, or stock, or bills payable, etc., has been kept, or when no intelligent account of any such matters has been kept. The bankrupt merchant or tradesman in such case is not entitled to a discharge, no matter what may have been his intention, as has been often held. On the other hand, when it appears that he has in some intelligent form or manner kept an account of those and other departments of his business; and yet is shown to have omitted one or more items from the accounts it then becomes a proper inquiry whether the omission was casual or intentional.

Keeping proper books of account, within the meaning of the Bankrupt Act, may be said to be the keeping of an intelligent record of the merchant's or tradesman's business affairs, and with that reasonable degree of accuracy and care which is to be expected from an intelligent man in that business. An intentional omission, fraudulent within the scope of the Bankrupt Law, would be conclusive that proper books of account had not been kept; whereas, if the omission to make the proper entry was not designed but casual, it is manifest that no such conclusion would necessarily follow. If on the other hand there were repeated omissions, evincing gross carelessness or want of reasonable care, it might justly be held that the bankrupt had not kept proper books of account, for he should be held

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not only for the utmost good faith, but to the exercise of at least ordinary care in keeping his accounts.

We have been guided by such considerations whenever the question has been presented whether the bankrupt, merchant or tradesman, has kept proper books of account. No case has been cited by counsel, and we have not been able to find any, which considers the questions we have discussed.

The primary consideration is whether the bankrupt has kept his accounts in such manner as to furnish an intelligent understanding of his affairs. If such has been the manner of keeping a record of his affairs, and yet mistakes are exhibited therein, it then becomes a proper subject of inquiry whether there is evinced reasonable care and an honest purpose to fully enter or keep proper accounts. If the court can answer these questions in the bankrupt's favor, he is, in our judgment, entitled to a discharge.

The fifteenth and last specification presents other objections to the bankrupt's book-keeping. They relate to several notes made by the bankrupt and endorsed by E. E. Winsor, discounted at the banking-house of M. V. Aldrich, in this city, the first one being for two thousand dollars, the others being renewals for such part of the original sum as from time to time remained unpaid. It is alleged that none of these notes were entered as bills payable. An examination of the books kept by the bankrupt shows that on a fly-leaf in the back part of his blotter these notes were all entered, except, possibly, the original note for two thousand dollars. The entries show the date, amount and time of payment, etc., in the form of memorandums; but afford all the information necessary to advise any intelligent person of the indebtedness evidenced by the notes. There can be no doubt but this answers the requirements of the law. The entry of the last note given in renewal shows the indebtedness subsisting at the time of the bankruptcy; those previously entered had been canceled as paid. The Court did not personally inspect the book as to the two thousand dollar note first given, but the attention of the bankrupt having been called as a witness to the fact whether it did there appear, he examined

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and stated it was entered and, as we understood, pointed out the entry. We therefore find the notes to have been entered in his books of account in such manner as to satisfy the requirement of the statute.

It was further objected by this specification that the bankrupt also failed to keep proper books of account, in that he gave to Eugene E. Winsor a chattle mortgage on a part of his personal property to indemnify him against any liability which Eugene should thereafter incur on account of the bankrupt in conducting as agent the bankrupt's Grand Rapids branch of business.

As the mortgage was evidence of no indebtedness and created no liability, but was given as mere indemnity against a possible future liability of the mortgagee, we entertain the opinion that there was no obligation on the part of the bankrupt to make an entry in his books of account of the giving of such mortgage. When, subsequent to the giving of the mortgage, Eugene became liable as endorser or otherwise upon the bankrupt's obligations, those obligations were entered in the manner we have stated. The mortgage, if it should come to have any valid effect as against creditors, would become a matter of public record in the proper Clerk's office; it belonged to no account usually kept by merchants; it occasioned no increase in the debtor or credit side of any account, and all that could be entered would have been a memorandum of its existence and the purpose for which it was given.

Our conclusion is that the bankrupt is entitled to a discharge from his debts. A decree will be entered in accordance with these views.

UNITED STATES DISTRICT COURT—W. D. NORTH CAROLINA.

In North Carolina a bond for title given on an executory contract for the purchase of lands conveys an equitable estate in the land to the vendee which is assignable.

An assignment of such estate to indemnify sureties, made without intent to

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delay or defraud creditors, is valid, and the assignee is entitled to priority over judgment creditors of the assignor.

Such assignment is valid although no money is paid; the debt upon which the sureties are liable furnishes a sufficient consideration to support it. It need not be registered to be available against creditors, unless the time limited by statute for the registration of the bond has expired.

Where the principal on a debt is insolvent, the sureties, in respect to their liability, are regarded in equity as creditors, and may retain any funds of the principal in their hands, even against an assignee for value, without notice.

An interest in lands, acquired at an administrator's sale, where the administrator has not made title, is assignable; and such assignment need not be registered under the laws of North Carolina in order to be valid against creditors.

Such equitable interest is liable to the liens of judgment creditors, subject to the equities of a surety of the debtor who holds a prior assignment thereof as indemnity for his liability.

In re WM. P. REYNOLDS. CARTER et al. v. McGEHEE et al.

On the 7th day of October, 1875, H. J. McGehee and others endorsed for W. P. Reynolds a note to the Planters' Bank of Danville for the sum of six thousand seven hundred and fifty dollars.

On the same day McGehee took from Reynolds an assignment of a bond for title to a tract of land in Stokes County, in said district, which assignment was made to indemnify McGehee and the other sureties against loss upon the said note.

The tract of land in Stokes County was valued at about eighteen hundred dollars, and there remained unpaid of the purchase money about one hundred dollars.

At the same time said Reynolds, in writing, assigned to said McGehee to indemnify him and others, as aforesaid, his right to a title for two tracts of land in the town of Madison valued at five hundred and fifty dollars, for which all the purchase money had been paid.

The said assignments were not recorded. Reynolds failed to pay the note to the Bank of Danville, and his sureties are liable for the same. Afterwards on November 25th and 26th, 1875, W. B. Carter, C. A. Reynolds and others obtained judgments against W. P. Reynolds, which were docketed in the counties of Rockingham and Stokes on the days mentioned.

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On the 27th day of November, 1875, W. P. Reynolds filed his petition in bankruptcy, and was thereafter adjudged a bankrupt.

The following question was certified by the Register for the opinion of the Court:

Is McGehee as assignee, as aforesaid, entitled to the proceeds of the real estate, before mentioned, as against the said judgment creditors?

Col. Jas. T. Morehead, for McGehee.

John H. Dillard and W. N. Mebane, for judgment creditors.

Boyd & Reid, for C. A. Reynolds, assignee.

DICK, J.—This is a controversy between judgment lien creditors and the sureties of a bankrupt, claiming under prior assignments, executed by way of indemnity for their suretyship.

The judgment creditors by docketing their judgments on the 25th and 26th days of November, 1875, acquired liens on all of the real property of the bankrupt situate in the counties where their judgments were docketed, whether the said property was or was not liable to sale under execution; but their liens were subject to all prior or superior equities, and to all subsequent paramount claims. (*Hoppock, Glenn & Co. v. Shober*, 69 N. C., 153; *Murchison v. Williams*, 71 N. C., 135.)

We must, therefore, consider whether the prior claims of McGehee et al. upon the interests of the bankrupt in the real property in controversy were valid and constituted legal or equitable rights equal or superior to the rights of said judgment creditors.

On the 9th day of October, 1875, McGehee et al. became the sureties of the bankrupt on a debt to the Planters' Bank of Danville, and McGehee, by way of indemnity, received written assignments of the interest of the bankrupt in said real property.

The rights of the parties accrued before the date of the adjudication in bankruptcy, and it was admitted on the argu-

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ment that the transaction with the bank was not void under the 35th Section of the Bankrupt Act, as being intended to hinder or delay creditors, or give a preference to a creditor on an antecedent debt. There is nothing in the Bankrupt Act, either in its language or object, that prevents an insolvent from dealing with his property—selling, exchanging, or pledging it—for other property, at any time before an adjudication of bankruptcy against him, provided such dealing be conducted without any purpose to defraud or delay his creditors, or give preference to any one, and does not impair the value of his estate. (*Cook v. Tullis*, 9 N. B. R., 433; 18 Wall., 332; *Tiffany v. Bootman Ins. Co.*, 9 N. B. R., 245; 18 Wall., 375; *Clark v. Iselin*, 9 N. B. R., 19; 21 Wall., 360.)

We will, therefore, proceed to ascertain and determine what were the rights of the parties to this controversy under our State laws.

What were the estates or interests which the bankrupt had on the 9th of October, 1875? He had contracted to purchase the lands in Stokes County, and had received a bond with covenant to make a title when the purchase money was paid. He had an equitable estate in the lands, but as the whole of the purchase money had not been paid to the vendor, such estate was not liable to sale under a *fi. fa.* (*Hinsdale v. Thornton*, 71 N. C., 381.)

This estate was assignable, and was assigned to McGehee on the 9th of October by a written endorsement on the bond for title. This assignment being in writing, signed by the assignor, was not in violation of the statute of frauds.

This assignment authorized the assignee, when his liability as surety became absolute by reason of the insolvency of the assignor, to complete the contract with the vendor by paying the balance due of the purchase money, and then demand the legal title. If the vendor refused to complete his part of the contract, then the assignee, in his own name (Code), by civil action, could have enforced the specific performance of the contract, or recovered judgment for damages assessed. (*Utly v. Foy*, 70 N. C., 303.)

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The consideration for the contract of assignment was sufficient, although no money was paid. It was made to indemnify the assignee as surety in the bank debt, and the debt of the creditor supplied the consideration to support the assignment. (*Wiswall v. Potts*, Jones' Eq., 184.)

As the principal in the bank debt is insolvent, his sureties, in respect to their liability, are in equity regarded as creditors as to rights and privileges, and may retain any funds of their principal in their hands, even against an assignee, for value, without notice. (*Battle v. Hart*, 2 Dev. Eq. 31.)

We have seen that the interest of the bankrupt in the Stokes lands was not subject to a *fi. fa.*, and the judgment creditors could not enforce their liens by such process. But suppose they could have sold, under execution, their rights, certainly, would not be superior to a purchaser under such sale.

It is a well settled doctrine that a purchaser at a sheriff's sale cannot protect himself against an equity, on the ground that he had not notice—for the sheriff can sell nothing but the interest in the estate which the defendant in the execution had at the time of sale. (*Reed v. Kinnamon*, 8 Ired. Eq., 13.)

Neither of the parties to this controversy have a legal title. The creditors insist that they have a judgment lien upon an equitable estate. The sureties present a prior assignment of the same equitable estate. Now, if the equities were equal, the question of notice—express or constructive—would not arise, and the rights of the parties would depend upon priority. It is only the purchaser of a legal title, without notice of a prior equity, who can hold against such equity. (*Polk v. Gullant*, 2 Dev. & Bat. Eq., 395; *Winborn v. Gorrell*, 3 Ired. Eq., 117; *Shaffner v. Fogleman*, Winst. Eq., 12.)

But the equities are not equal. The equity of McGehee is founded upon a contract *in rem*, and the equity of the creditors is derived from a lien by judgment. In such cases it is well settled that a claimant under a trust or contract *in rem* has acquired an equity to the specific thing which binds the conscience of the original holder, while a judgment creditor has

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not advanced his money on the specific security, and is entitled to his debtor's real interest alone, that is, his interest, subject to his equities as they exist at the date of the judgment. (Adams' Eq., 149.)

And further upon this point:—

The creditors acquired no *estate* by their liens, they could not even enforce their liens by execution, but only had a mere right to ask a Court of Equity to make their liens available against—first, the personal property of the debtor, and then the real property in possession of the debtor, or of creditors or purchasers who had not equal or superior equities. (*Murchison v. Williams, supra.*)

McGehee acquired the equitable estate by his assignment, made upon the consideration of incurring a responsibility for a large debt. Surely the holder of such an estate has a superior equity to those who only have rights to equitable relief arising by mere operation of law.

Is the assignment of McGehee void as against general creditors, for the want of registration?

The assignment is not in the form of a deed in trust, or mortgage, which are required to be registered, and are only valid against creditors or purchasers for a valuable consideration from the date of registration. (Bat. Rev., Chap. 35, Sec. 12.)

The assignment has the nature and effect of a mortgage—but all such instruments are not required to be registered under Sec. 12, to make them valid against creditors.

The bond for title in this case has the nature and effect of a mortgage; but its validity as against creditors does not arise at the date of registration. It is a contract for the sale of land, and must be registered within two years from date (Bat. Rev., Chap. 35, Sec. 24), unless the time is extended by legislation on such subject. Its validity commenced at date, and the two years limitation had not expired. (*Edwards v. Thompson*, 71 N. C., 177.) As the bond for title was not required to be registered under Sec. 12, I can see no reason why the assignment on the back of the bond should be subject to more rigid requirements.

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Mr. Moorehead, as counsel for McGehee, insists that the following well established principle is applicable to the question before us: He says that the purchaser of land at a sheriff's sale acquires the legal and equitable rights and title of the defendant in the execution, and may assign his rights either in writing or by parol (*Testerman v. Poe*, 2 Dev. & Bat., 103), and such assignment in writing need not be registered, although a contract relating to land.

Mr. Moorehead further insists that the creditors have not liens upon the property in controversy as, under the Code, Sec. 254 (Bat. Rev., 201), a docketed judgment only creates a lien upon "real property," that the interest of the bankrupt is not "real property," as defined in Code, Sec. 388 (Bat. Rev., 239), but is a right which can only be enforced by civil action, and is included in the definition of personal property. Sec. 289.

We will not pause in this place to consider the propositions and the ingenious argument of the learned counsel, as we do not consider the points presented as material in the decision of the question before us in this part of the case.

We will now consider the questions presented us in the other property in controversy. The lots in Madison had been sold by McGehee, as administrator, under a license of Court, to pay the debts of his intestate. The bankrupt was the purchaser, and on the 9th of October, 1875, had paid all the purchase money, and an order had been made by the Court for the said administrator to make title. The legal title was in the heirs at law of the intestate—the administrator had not completed the execution of the power with which he had been invested—and the bankrupt had an estate in equity, and a right to call on the administrator to complete the execution of his power by conveying the legal title.

The written instrument executed to McGehee, by the bankrupt, was not an assignment of the estate in equity, but a mere agreement not to demand the legal title until McGehee was saved harmless from his liability as surety to the bank debt. It was a suspension of the right to call for the execution of the power with which McGehee was invested as an officer of the

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Court. McGehee could never have made a title to himself, but upon paying the debt, or upon becoming absolutely responsible for the same by the insolvency of his principal, he could have applied to the State Court, which had invested him with the power of selling and making title, and by a motion in the same could have obtained adequate relief. (*Evans v. Singletary*, 63 N. C., 205; *Mason v. Osgood*, 64 N. C., 467.)

The equitable estate, being in the bankrupt, became liable to the liens of the docketed judgments, subject to the equity acquired by McGehee, founded upon his suretyship. As the insolvency of the bankrupt has been adjudicated by this Court, and McGehee and his co-sureties have become absolutely responsible for the bank debt, McGehee is entitled in this Court to enforce the equities acquired for the indemnity of himself and co-sureties.

It was insisted in the argument that the writing to McGehee should have been registered under Sec. 2 (Bat. Rev., Chap. 35) to make it valid against creditors, etc. It was not a deed of trust or a mortgage, and conveyed no legal or equitable estate in land or title to other property, but conferred only a right to apply to a court exercising equitable jurisdiction for the relief above indicated.

It was said that the transaction was at least the assignment of a chose in action. Grant this for the sake of the argument:—the assignment was not by deed of trust or mortgage, and only such assignments are included in Sec. 12 of said statute. There are many choses in action which may be assigned as collateral security for a debt, and such assignments need not be registered. (*Doak v. The Bank*, 6 Ired., 309.)

And further, if this was the assignment of a chose in action, the creditors cannot claim the benefit of liens, as the docketing of judgments only create liens on real property.

If, then, this interest of the bankrupt was a chose in action, and the writing to McGehee was void for the want of registration, then the distribution of the proceeds of sale would be made among the general creditors—for in a Court of Bankruptcy, where there are no prior valid incumbrances or liens on

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the fund for distribution, the controlling maxim is "Equality is Equity."

After carefully considering the authorities cited in the argument, I am inclined to the opinion that the instruments which Sec. 12 of the said statute requires to be registered to be valid against creditors are deeds of trust or mortgages of real or personal estate, which *pass a property* in the things conveyed from one person to another, and that said statute does not apply to instruments that give rise to a mere right to equitable relief.

Thus a bond for title conveys no property from the vendor to the vendee, but creates only an equitable right. Upon payment of part of the purchase money by the vendee his right in equity is enlarged into an equitable estate to the extent of the payment, and when the whole of the purchase money is paid, the vendee has a complete equitable estate. The vendee is regarded in equity as the owner of the bond, and may at any time call for a conveyance of the legal title—yet the bond for title need not be registered under said section to make it valid against creditors of the vendor. (*Edwards v. Thomson, supra.*)

The vendor might sell and convey the legal title to a purchaser for value, without notice, and thus destroy the equitable estate. (*Derr v. Dillinger, 75 N. C., 300.*)

This, however, is an old and well established doctrine of equity, and does not arise in any way out of the section of the statute we are considering.

We will present another illustration of the principle we are discussing. A purchaser at sheriff sale acquires a *right* to the estate or interest of the defendant in the execution. This right he may transfer either by parol or in writing, and no registration is needed. If the purchaser has paid part of his bid, he acquires a sufficient title to stand as security for the money advanced, and the transaction, though not in writing and registered, is valid against a subsequent purchaser at execution sale unless intended to deceive creditors, etc. (*Testerman v. Poe, supra.*)

We again repeat the self-evident principle that the rights

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of a creditor under a judgment lien cannot be greater against prior equities than the rights of a purchaser under an execution founded upon such judgment.

We have seen that the purchaser of a legal title for valuable consideration, without notice—actual or constructive—is not bound by prior equities. But it is well settled that a purchaser at execution sale takes subject to the equities which the estate is liable to in the hands of the debtor, and this principle is especially enforced where the debtor only had an equitable estate. In many cases where these paramount equities were enforced against purchasers at execution sale, the contracts out of which such equities arose were not in writing (*Vannoy v. Martin*, 6 Ired. Eq., 169), and others were in writing but not registered under said Sec. 12. (*Henderson v. Hoke*, 1 Dev. & Bat. Eq., 119; *Freeman v. Hill*, Id., 389; *Polk v. Gallant*, 2 Dev. & Bat. Eq., 325; *Johnson v. Lee*, Busb. Eq., 43; *Rutherford v. Green*, 2 Ired. Eq., 121; *Freeman v. Mebane*, 2 Jones's Eq., 44; *Shaffner v. Fogleman*, *supra*; *Hicks v. Skinner*, 71 N. C., 539.)

If the equity of McGehee arose out of a deed in trust or a mortgage, then the question of notice—actual or constructive—would not be material, as no notice, however full, would supply the place of registration. (*Robinson v. Willoughby*, 70 N. C., 358.)

But I am of the opinion that the instrument under which McGehee claims is not a deed of trust or mortgage as contemplated in Sec. 12 of said statute, as it conveys no title to the equitable estate of the bankrupt. The estate was acquired under a decree of the Court of Probate, and creditors or purchasers could have at any time easily obtained information as to the state of the title. The covenant with McGehee was not intended to hinder or delay creditors, or give a preference to a creditor for an antecedent debt, and did not diminish the estate of the bankrupt, but was for the *bona fide* purpose of enabling the bankrupt to obtain money to discharge his indebtedness, and thereby save himself from insolvency.

I am, therefore, of the opinion that, independent of priority

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in date, the equity of McGehee is superior to the rights of the judgment creditors, and ought to be recognized and enforced in this Court.

The proceedings in bankruptcy have invested this Court with full jurisdiction over the estate of the bankrupt, and over all parties interested in the same, and ought to ascertain, adjust, and determine the rights of such parties.

The assignment and covenant made to McGehee were intended as indemnities against the bank debt, and such debt supplied the consideration of the transaction, and that debt has not been paid. The interest of the bank creditor is therefore the primary object to be protected in equity. (*Wiswall v. Potts, supra*; *Burke v. Jenkins*, 64 N. C., 719.)

It is therefore considered and adjudged by the Court that the assignee pay to the vendor the balance of the money due him on the Stokes lands, and then apply the balance of the proceeds arising from the sale of the real property in controversy in discharge of the bank debt, so as to indemnify McGehee and his co-sureties to the extent of such payment.

UNITED STATES DISTRICT COURT—MINNESOTA.

JULY 28, 1877.

Where an insolvent who has made a general assignment for the benefit of creditors is afterwards adjudged a bankrupt, the assignee under the assignment is entitled to his disbursements legitimately made in the execution of his trust, but is not entitled to priority as to his compensation as such assignee, nor as to attorneys' fees incurred in connection with the assignment—as to such items he stands in the same position as other creditors and must prove his claim.

In re GEORGE LAINS.

Lains failed in business and made an assignment December 21, 1876, to Frank Keogh for the equal benefit of his creditors. This assignment was made at the suggestion of a firm of creditors, of which the assignee was a member. On January 18,

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1877, the debtor was adjudged a bankrupt on his own petition. An assignee in bankruptcy was appointed. The assignee under the common law assignment turned over all the debtor's property in his hands, only retaining from the money in his possession sufficient to reimburse himself for payments made on account of collections, to compensate him for his services as assignee, and for attorneys' fees.

The assignee in bankruptcy was about to commence proceedings to recover the money thus retained, when by stipulation the subject is presented to the court for a decision upon the claim of the assignee under the State law.

Mead & Thompson, for claimant.

Young & Newell, for assignee.

NELSON, J.—The assignee under the general assignment for the benefit of creditors is entitled to the disbursements legitimately made in the execution of his trust before the debtor was adjudged bankrupt. He had paid out at that time for collections, etc., quite an amount, and such expenditures would seem to have been just as necessary to realize money out of the estate had it been in charge of an assignee in bankruptcy. There can be no objection to an allowance for these expenses, and no creditor dissents. He has, however, presented a bill for personal services as assignee, claiming payment for more than fifteen days' employment, and also for attorneys' fees paid by him.

The claim for services does not rest on any better footing than the ordinary debts of creditors. The assignee was aware of the insolvency of the debtor at the time the deed to him was executed, and also knew that a contingency might arise when his title under the assignment must yield to that of an assignee in bankruptcy. Such an assignment was an act of bankruptcy on the part of the debtor, and in fraud of the Bankrupt Act, and evidence of an attempt to defeat its operation. The assignee is chargeable with knowledge of facts which would render the deed to him void, and by his conduct was aiding the

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debtor to place his assets in course of distribution different from that contemplated by the Bankrupt Law. There is nothing in the merits of his claim which entitle it to a preference, but the amount being fixed by the State Court as reasonable compensation, he can prove up his claim as any other creditor before the register in bankruptcy.

The attorneys' fee was for drawing up, and attending to, the business connected with the assignment, and as this service is alleged to have been done on behalf of the debtor, it can only be allowed on proof as any other claim. It was rendered at the instance of the debtor. The creditors now objecting never requested it, and there is nothing in the papers before me, except an order by the State Court declaring the sum reasonable, which entitles the claim to any consideration.

These two claims must take their dividends on a regular distribution of the bankrupt's estate, and cannot be preferred.

Ordered accordingly.

NEW YORK SUPREME COURT—FOURTH DEPARTMENT.

APRIL, 1877.

Where the marshal has demanded of, and received from a sheriff property which the latter holds under an execution levy, and delivers the same to the assignee, an action for a wrongful taking and conversion cannot be maintained by the judgment creditor against the assignee.

Such an action cannot be maintained in a State Court as an enforcement of a lien upon the funds in the hands of the assignee, acquired by virtue of the judgment. Such lien can only be enforced in the Bankrupt Court.

*ANSONIA BRASS and COPPER COMPANY v.
PRATT, Assignee, etc., of HEMAN. H. FRINK.*

APPEAL from a judgment in favor of the plaintiff, entered on the trial of this action by the court without a jury.

This action was brought to recover from the defendant, as the assignee in bankruptcy of Heman H. Frink, the amount of a judgment recovered by the plaintiff against said Frink on the

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23d day of June, 1873, for the sum of three hundred and forty-six dollars and four cents.

An execution on said judgment was issued to the sheriff of Jefferson county, and was by him levied on the 26th day of June, 1873, upon personal property of Frink sufficient to satisfy the execution. On the 4th of August, 1873, proceedings in bankruptcy were commenced against said Frink, resulting in his being declared a bankrupt on the 15th of August. On the 4th of August an *ex parte* order was issued out of the Bankruptcy Court, in said proceedings, restraining the sheriff from disposing of said property levied upon by him, until the further order of that court. Thereafter a warrant was issued to the marshal to take possession of the bankrupt's property, and the marshal, by virtue thereof, demanded possession of the property held by the sheriff under said levy, and the sheriff thereupon delivered to the marshal the keys of the store in which the property was contained, and the marshal took possession of the property. The marshal subsequently turned over the property to the defendant herein as assignee in bankruptcy, who sold the same, and took the proceeds as assignee.

The cause was tried at the Jefferson Circuit, without a jury.

The judge found that the plaintiff is entitled to recover against the defendant the amount due upon the judgment, besides costs.

S. R. Pratt, appellant, in person.

M. P. Stafford, for the respondent.

SMITH, J.—If this action is regarded as sounding in tort, for an alleged wrongful taking and conversion of the personal property in question, it is difficult to see how it can be maintained. The plaintiff had no title to, or interest in the property of Frink, by virtue of the levy, which would sustain the action. The property, when levied on, was in custody of the law, and the sheriff was the only party who could recover for a wrongful taking while the levy was in force. (*Barker v. Mathews*, 1 Den., 335; *Skinner v. Stuart*, 39 Barb., 206.)

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The sheriff is responsible to the plaintiff for the value of the property levied on under its execution. It is no defense to the sheriff that the property was wrongfully taken from his custody by a third person. For such taking the sheriff may have his action against the wrong-doer, and thus indemnify himself. This court held recently in an action by the plaintiff herein against the sheriff, growing out of this very transaction, and on the same facts, that the sheriff was liable to the plaintiff for releasing the property in question and turning the same over to the marshal. (8 Hun, 157.)

The counsel for the respondent insists that the want of title in the plaintiff is not now available to the appellant, as the point, he says, was not taken at the trial. If it had been, he suggests it might have been obviated by showing that the plaintiff sued at the request of the sheriff.

It is, undoubtedly, a well-settled rule, that when a motion for a nonsuit is made, without stating the grounds of it, mere formal objections, which were not brought to the notice of the court, and which might have been obviated if attention had been called to them at the trial, will not avail on appeal from the decision refusing a nonsuit. (*Castle v. Duryea*, 32 Barb., 480; *Binsse v. Wood*, 37 N. Y., 526; *Mallory v. Travellers' Insurance Co.*, 47 id., 52.) Here, however, the objection goes to the very foundation of the action. Proof that the plaintiff sued at the request of the sheriff would not have helped the case. Such request would not have transferred the right of action. Where the objection is of such a nature that it cannot be obviated, the rule adverted to does not apply. (*DeLafield v. State of Illinois*, 2 Hill, 159; *Cook v. Whipple*, 9 N. B. R., 155; 55 N. Y., 150.) But in the present case the grounds of the motion for a nonsuit were specified. The record states that the defendant's counsel moved for a nonsuit "on the ground that the plaintiff had failed to establish a cause of action against this defendant; that there is no proof that the notice of twenty days to the assignee in bankruptcy before bringing suit has been served on the assignee, as required by the provisions of the Bankrupt Act; and, also, that this court has no

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jurisdiction to entertain this action." The first ground was broad enough to include the objection now under consideration. It may admit of question whether it was sufficiently specific, although the statement of the other two grounds necessarily confined it to limits not occupied by them. But it appears, by the statement of the reasons given by the judge for his decision, that his attention was called to the point, and that he was of the opinion that the sheriff held the goods as the agent of the plaintiff in the execution, and that his special interest in them inured to the benefit of the plaintiff. It is manifest, however, that, in the hurry of the Circuit, the learned judge fell into an error in that particular, and that if the plaintiff's action rests upon no other ground than a wrongful taking and conversion, it must fail.

Another objection to the action, as one sounding in tort, is, that the taking was not wrongful. The sheriff voluntarily delivered the property to the marshal, and the marshal turned it over to the assignee. The sheriff was under no obligation to part with the property. On the contrary, it was his duty to resort to all reasonable means to protect his levy. This point was adjudged in the case of this plaintiff against the sheriff, above referred to. The defendant, therefore, was not chargeable with a conversion unless he refused to give up the property, or its proceeds, after demand, and of that there is no evidence. This point, however, was probably waived by the omission to take it at the trial.

The only other view that can be taken of the nature of the action is, that it has for its object the enforcement of the lien which the plaintiff has, by virtue of its judgment, on the fund in the hands of the assignee. In that aspect of the case, the difficulty is, that a State Court has not jurisdiction of an action to enforce and liquidate a lien upon a fund in the hands of the Bankruptcy Court. In this case, the fund is the proceeds of property which was voluntarily surrendered to the marshal by the sheriff. As we have seen, the plaintiff has its right of action against the sheriff. If it has also a lien on the fund in the hands of the assignee (a question which, in our view of the

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case, it is not necessary to decide), such liens can only be enforced in the court in which the bankruptcy proceeding is pending. (Bankrupt Act of 1867, § 57.) In *Havens v. National City Bank of Brooklyn* (13 N. B. R., 95) it was held, by the General Term of this court in the second department, that no State Court can require a bank, in which the funds belonging to a bankrupt's estate are deposited to the credit of the assignee in bankruptcy, to pay a judgment against the assignee of such bankrupt out of such funds. The fund is in the Bankrupt Court to be disposed of by order of that court. If these cases were correctly decided, this court would have no power to execute the judgment appealed from, if it should be allowed to stand. It has been held, in some of the federal courts, that an assignee appearing without objection in an action, brought in a State Court, to enforce a lien upon the property of a bankrupt, cannot be heard on appeal to object to the jurisdiction. As, for instance, where the assignee appeared in an action to foreclose a mortgage, and made a contest for the surplus. (*Mays v. Fritton*, 11 N. B. R., 229 ; 20 Wall., 414.) But unless an assent thereto shall first be given by the assignee, as an officer of the court, no person can enforce a specific lien, such as a mortgage or a judgment in a State Court, while proceedings in bankruptcy are pending. (*In re Brinkman*, 7 N. B. R., 421 ; *Augustine, Assignee, v. McFarland*, 13 id., 7 ; *Bingham v. Claflin*, 7 id., 412, decided by the Supreme Court of Wisconsin.) The rule is well stated by the Supreme Court of North Carolina, SETTLE, J., in these words: "The Bankrupt Law does not divest a lien, but as all the property of a bankrupt, as well that subject to mortgages and liens as that which is unincumbered, passes to the assignee, and is in *custodia legis*, subject to priorities and liens, it follows that the Bankrupt Court is the proper tribunal in which to administer the remedies for the enforcement of liens. The State Courts may be employed to collect the assets of a bankrupt, and also to ascertain the liens which may exist on such assets ; but it is one thing to ascertain a lien, and quite another to liquidate it." (*Blum, Ex., v. Ellis*, 13 N. B. R., 345.)

In re Skoll.

We are of opinion that the objection to the jurisdiction of this court is well taken, and that it is fatal to the action against the assignee, whether it be regarded as an action to enforce the specific lien of the judgment on the fund in his hands, as the officer of the Bankruptcy Court, or to compel payment, out of the fund, of the damages resulting from the alleged wrongful conversion.

In any view of the action, therefore, we think it cannot be maintained.

Judgment reversed and new trial ordered, with costs to abide event.

MULLIN, P. J., and TALCOTT, J., concurred.

UNITED STATES DISTRICT COURT—MINNESOTA.

JULY 21, 1877.

Upon the institution of proceedings in bankruptcy an assignee for the benefit of creditors may be enjoined from interfering with the debtor's assets before an adjudication has been had.

In re JACOB SKOLL.

Certain creditors of Skoll, a clothier at Minneapolis, claiming to represent one-fourth in number of his creditors, and one-third of the amount of his indebtedness provable under the Bankrupt Law, have commenced proceedings to have him adjudged bankrupt. On July 7th, Skoll made an assignment to one Clementson of his stock of goods for the benefit of his creditors equally. On filing the petition in bankruptcy, application was made for an injunction to restrain Clementson from making any transfer of the debtor's property, which was granted. A motion is now made to dissolve the injunction.

NELSON, J.—This assignment is a fraud upon the Bankrupt Law, and an act of bankruptcy. Such is the settled doctrine in this district. *In re Burt*, 1 Dillon, 439.

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Clementson, the assignee, does not occupy the position of a *bona fide* purchaser. The assignment to him is voidable, and creditors can by bankruptcy proceedings set it aside. If they comply with the 39th section of the Bankrupt Law of 1867, as amended, the debtor will be adjudged a bankrupt, and the assignment having been made by him when admittedly insolvent, his assignee in bankruptcy may recover the property or the value thereof.

The Bankrupt Law contemplates a distribution of the debtor's assets in the Federal Court and a full administration in that jurisdiction; and provides that transfers or conveyances defeating its operation shall be void. It is manifestly then my duty to protect the right of creditors to have the property thus distributed, and to that end restrain, by injunction, the assignee under the State Law, seeking to take the property from the control of the Bankrupt Court, and compel him to desist from disposing of it before an adjudication in bankruptcy.

In that way only can full effect be given to the operation of the Bankrupt Law.

Motion denied.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 30, 1877.

Where notes given upon a composition settlement fall due pending action upon a petition to review the order of confirmation, and the petitioners refuse to receive payment, the money must be paid into court in order to absolve the bankrupt from liability.

Under such circumstances, upon a subsequent demand of payment by the creditor, and refusal by the bankrupt, the former is entitled to a summary order for payment.

In re ALFRED P. REYNOLDS.

Motion to enforce the provisions of a composition by a bankrupt.

The resolution of the creditors provided for the payment by the bankrupt of his composition settlement in deferred pay-

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ments, to be evidenced by the promissory notes of the bankrupt payable in six, nine and twelve months.

In pursuance of the provisions of the resolution, the bankrupt delivered to the Register having charge of the proceedings his promissory notes payable at the times provided for.

The petitioners in this application were four creditors who had opposed the composition in the District Court, and after the final order confirming the same was entered, had petitioned the Circuit Court for the said district to review the order. Before the hearing upon the petition in the Circuit Court, the deferred composition payments became due, and the bankrupt attended at the office of the Register in pursuance of a notice sent to all of his creditors, and paid the notes of all excepting the petitioners, who did not appear to receive payment.

Subsequently the petitioners demanded payment of their notes, which was refused.

E. H. Lewis, for the creditors.

A. C. Fransioli, for the bankrupt.

BLATCHFORD, J.—I understand from the affidavit of the bankrupt, that on each occasion when each of the notes coming to each of the four unpaid creditors fell due, he had ready and in hand the money to pay them, according to the terms of the composition. In respect to such money, he was a trustee thereof for the creditors. Although a delivery of the notes to the Register was a delivery of them to the creditors, so as to absolve the bankrupt from the necessity of making any other delivery of the notes to the creditors, yet, when the time came to pay the notes, it was the duty of the bankrupt, if he could find no one who would take the money for the four creditors, to pay the money into the Bankruptcy Court; and this all the more because he must have known that while those creditors were prosecuting their petition of review they would not take either the notes or the money. In fact, the affidavit of the bankrupt shows that the notes, when they severally matured, remained with the Register, and it is to be inferred

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that the bankrupt then knew that fact. The bankrupt, even if he had tendered the money in each instance to each of the four creditors personally, would not have discharged his whole duty without paying it into court on their refusal to receive it, unless he was willing to take the risk of being ready to pay it whenever afterwards called upon to pay it. As it was, on the facts shown by him, he ought to have paid it into court.

If he had done so, he would have discharged himself from responsibility. The creditors are entitled to an order that he pay them the money.

UNITED STATES DISTRICT COURT.—E. D. MICHIGAN.

JULY 9, 1877.

Where an assignee sold property encumbered by a chattel mortgage, without an order of Court, and the mortgagee brought trover against the purchaser in a State Court, in a county where the parties and their witnesses resided, *Held*, that even if the District Court had jurisdiction to restrain the prosecution of the suit, it ought not to do so under the circumstances of the case.

In re ABRAM COOPER.

On petition of assignee for an injunction restraining the prosecuting of a suit in the State Court.

The petition set forth that, on the 20th day of April, 1875, the bankrupt executed to Grove & Whitney a chattel mortgage upon his undivided one-half interest in certain machinery and fixtures, these being his principal assets; that the actual indebtedness to Grove & Whitney did not exceed one-half the nominal amount secured by the mortgage; that on the 3d day of July, 1876, petitioner made a conditional private sale of said half-interest to Alfred Wise, receiving therefor certain notes to the amount of two thousand three hundred and eighty-eight dollars and twenty-five cents, the purchaser being at that time the owner of the other half of the property; that the sale was made without an order of the Court, but with the approval

In re Cooper.

of the petitioning creditors, and with the agreement that Wise should be insured against any loss by reason of the chattel mortgage, he to have the property free from encumbrance; that the amount realized upon the notes exceeded considerably the claim of the mortgagees; that the petitioner believed the mortgage to have been procured by fraud and deceit, and that nothing was due to the mortgagees, and that he desired to contest the same; that on the 10th of October, the mortgagees commenced an action of trover in the State Court, against the purchaser, Wise, to recover damages for the conversion of their half-interest in the property; that, by the trial of the cause in the State Court, the assignee will be occasioned much trouble and expense, and the question of the validity of the mortgage be undetermined; that the sale to Wise was a most fortunate transaction for the creditors, as they will receive a much larger dividend than could have been secured in any other way, and prayed that the sale to Wise might be ratified and confirmed, and be declared to be free and clear of any lien or encumbrance by reason of any claim of the mortgagees; that petitioner be directed to pay into Court the sum of one thousand five hundred dollars, a portion of the proceeds, and that the sum be declared to be subject to the amount actually due them, and that the mortgagees might be restrained from further prosecuting the suit in the State Court.

The answer admitted that the indebtedness did not exceed twelve hundred dollars, and that the mortgage was made for a larger amount to secure other creditors, who were to be paid by the mortgagees, but further averred that the trover suit was instituted for the sole purpose of recovering the actual mortgage interest in the property, and that the assignee undertook the defence of the suit, procured a continuance for one term, announced himself ready for trial, and then procured an injunction. The further allegations of the answer were immaterial. It appeared that the mortgagees had proved their debt as a secured claim.

Don. M. Dickinson, for the assignee.

M. V. Montgomery, for the mortgagees.

In re Cooper.

BROWN, J.—The assignee having sold the property without an order of Court directing a sale free of encumbrances, conveyed simply the interest of the bankrupt, subject to the lien of the mortgage. (*Kelley v. Strange*, 3 N. B. R., 8; *In re Mebane*, 3 N. B. R., 347; *In re McClellan*, 1 N. B. R., 389; *2d Nat. Bank v. State Nat. Bank*, 11 N. B. R., 49; *Ray v. Brigham*, 12 N. B. R., 145; *Wicks v. Perkins*, 13 N. B. R., 280.) If the assignee had desired to test the validity of the mortgage, he should have petitioned the Court, upon notice to the mortgagee, for an order to sell the property free from encumbrance. (*Ray v. Brigham*, 12 N. B. R., 145; *Meeks v. Whateley*, 10 N. B. R., 498.) So long as the property remained in the hands of the assignee, the regular practice for the mortgagees was undoubtedly to prove their debt, and ask leave to sell the property themselves, or require the assignee to sell it, and pay the amount justly due them from the proceeds.

But, the assignee having sold the property subject to the mortgage, and having thereby released the possession he held on behalf of the Court, I see no impropriety in the mortgagees bringing suit in the State Court to enforce their security. Indeed, I can hardly see what other remedy they would have had except upon the theory that the property was sold free of encumbrance; but, as no notice was given them of the sale, it would be obviously inequitable to hold that the property had been discharged of the lien. As matter of law, I see no objection to their proceeding in a State Court. (*King v. Bowman*, 24 La. Annual, 506; *Douglass v. St. Louis Zinc Co.*, 56 Mo., 388; *Samson v. Clark*, 6 N. B. R., 403; *In re McGilton*, 7 N. B. R., 294; *Whittridge v. Taylor*, 66 N. C., 273; 58 Ill. 176.) It is well settled, too, that if the proceeding is instituted without the authority of this Court, it will not be void; nor will this Court interfere where no injury can result to the bankrupt estate. (*In re Iron Mountain Co.*, 4 N. B. R., 646; *In re Bowie*, 1 N. B. R., 628; *In re Brinkmann*, 6 N. B. R., 541.) The property having been sold by the assignee, and the action of trover being brought against the purchaser, it seems to me doubtful whether this Court has any power to interfere. But,

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viewing it simply as a matter of discretion, I see no objection to the mortgagees proceeding to determine the amount of their lien in the State Court. The mortgage was given more than three months before the commencement of proceedings in bankruptcy, so that any peculiar defence based upon the provisions of the Bankrupt Act has been barred by lapse of time. In any event, they will not be allowed to recover more than the amount of their lien. The suit is prosecuted in a county where the parties, the assignee and the witnesses, all reside. I cannot assume that complete justice will not be done all parties, and no reasons seem to me to exist for interfering with the action of the State Court. The petition must be denied.

UNITED STATES DISTRICT COURT—WISCONSIN.

AUGUST, 1877.

If on dissolution of a copartnership, the retiring partner takes out a portion of the assets of the firm for his individual use, he must do so without impairing the fund to which the creditors have the right in equity to look for payment; and it must be made clearly to appear that such remaining fund is ample.

Where a copartnership is insolvent, or is possessed of assets not more than adequate for the payment of debts, one member of the firm cannot upon retiring rightfully withdraw beyond the reach of creditors, and to their injury, a portion of the assets and make a personal appropriation of those assets by placing them in the form of a homestead.

Under such circumstances, though it takes the form of a homestead, the property is as much within the reach of a Court of Equity as before; and no such change in its character can give it new sacredness, or endow its possessor with new privileges in its ownership or use.

In re SAUTHOFF & OLSON, Bankrupts.

Sauthoff and Olson were copartners, doing business at Madison, Wisconsin, as dealers in clothing. The copartnership was formed in 1865, and the parties continued in business until January 27, 1876, when Sauthoff purchased from Olson his interest in the business, and the firm was dissolved.

From the testimony it appeared that there was about the same quantity of goods in the store at the time of the dissolu-

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tion as at the time of bankruptcy. The outstandings of the firm at the time of dissolution, on their face, amounted to about ten thousand dollars. Their liabilities then due and to become due, were a little over nine thousand dollars, of which amount about six thousand dollars remained unpaid when the petition in bankruptcy was filed.

By the terms of dissolution, Sauthoff was to pay Olson for his interest in the property and business six thousand five hundred dollars, and the transaction was consummated by the payment to Olson in cash of one thousand dollars, the execution by Sauthoff to Olson of two notes, one for one thousand dollars, and the other for one thousand eight hundred and fifty dollars, and by the further delivery to Olson of a portion of the book accounts of the firm, such portion so delivered amounting to two thousand six hundred and fifty dollars, on their face. Sauthoff assumed the firm debts and continued the business, making some additional purchases of goods and incurring new liabilities therefor.

In April, 1876, but little more than two months subsequent to the dissolution, Sauthoff was unable to meet his liabilities, which included such as remained unpaid of the late firm, and sought a compromise with his creditors, offering them thirty cents on the dollar. Subsequently, and within a short time, bankruptcy proceedings were commenced against Sauthoff & Olson. Previously, and in March, 1876, Olson had purchased a homestead. He had also collected about one thousand four hundred dollars in money from the outstandings turned out to him by Sauthoff at the time of the dissolution of the firm. A portion of this money, together with the one thousand dollars which Sauthoff had paid him in cash, was used by him in partial payment of the purchase price of the homestead. The remainder of the accounts in his hands, uncollected, and amounting to about one thousand two hundred and fifty dollars, he, subsequent to the bankruptcy, on demand, delivered to the assignee.

The stock in trade in the hands of Sauthoff, at the time of the bankruptcy, was subsequently sold by the assignee for about

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eight thousand two hundred dollars. From the accounts and demands which came to the assignee he collected about one thousand four hundred dollars.

The assignee, in behalf of creditors, by the present proceeding seeks to reach the one thousand dollars paid in cash at the time of the dissolution, by Sauthoff to Olson, and also the sum of one thousand four hundred dollars collected by Olson upon the book accounts which he took on the transfer of his interest to Sauthoff, and to charge the homestead property of Olson, acquired as before stated, with the payment of so much of these amounts as were expended in the purchase of that property; it being claimed, on the part of the assignee, that the dissolution of the copartnership and the payment by Sauthoff to Olson of the one thousand dollars, and the delivery to the latter of a portion of the book accounts of the firm, operated as a fraud upon creditors, and that Olson should restore to them what he thus received. No payment has been made to Olson by Sauthoff upon the notes for two thousand eight hundred and fifty dollars, given upon the termination of the copartnership.

H. M. & H. A. Lewis for assignee.

Vilus & Bryant for bankrupt Olson.

DYER, J.—In a case where a copartnership which is indebted, has been dissolved, the retiring partner withdrawing, on transfer of his interests, a portion of the assets or capital, and the transaction being followed at a not very remote period by the insolvency of the member assuming the debts and continuing the business, it is the duty of the Court, when called to consider the rights and liabilities of the parties, to look cautiously into the facts, with a view to the discovery of any possible fraud, and the correction of any wrong that may have resulted to creditors.

The principle is elementary, that in equity partnership creditors have an absolute priority of claim upon the partnership property for payment of their demands, and that the interest of each individual partner is his share of the surplus after payment of the partnership debts. To such an extent has this rule

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been carried, that it has been held, that where a partner sells his interest to a stranger, or it is sold upon execution against him, his right to have the partnership debts paid, and his liability therefor discharged out of the property, are not divested by the sale, and that such a sale gives to the purchaser only such an interest in the assets as may remain after the payment of partnership debts. (*Menagh v. Whitwell*, 52 N. Y., 146; *Osborn v. McBride*, 16 N. B. R., 22.) The sale of partnership property by one of a firm of commercial partners, on the eve of his insolvency, will be set aside. (*Saloy v. Albrecht*, 17 La. Ann, 75.)

The appropriation by an insolvent firm of partnership property to the payment of the individual debts of one partner, is not simply void, but is fraudulent, and avoids the deed of assignment. (*Wilson v. Robertson*, 21 N. Y., 587.)

Admitting the full force of these principles, it is also true that they are not so enforced as to operate against or affect a dissolution of copartnership made in good faith, and which is unaccompanied by any improper withdrawal of assets beyond the reach of creditors.

“The right of copartners, upon dissolution, to transfer the joint property to one of the firm is clear and unquestionable. The effect of such a transfer as between the partners, is to vest the legal title to the property in the individual partner, with a right to use and dispose of it as his separate estate. * * If, in such transfer, there is no fraud and collusion between the copartners, for the purpose of defeating the rights of the joint creditors, and the transaction is made in good faith upon dissolution, and for the purpose of closing the affairs of the partnership, the joint property thereby becomes separate estate, with all the rights and incidents, both in law and equity, which properly attach thereto.” (*Howe et al. v. Lawrence et al.*, 9 Cush., 555.)

These are principles applicable to a case where one partner retires and the other takes the entire property and assets; and they are substantially reiterated in *Sage v. Chollar*, 21 Barb., 596, and in *Waterman v. Hunt*, 2 R. I., 298. See also, *Dimon v. Hazard*, 32 N. Y., 65. Where, however, the circumstances

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of the case show that the dissolution of the partnership is a fraud, as if it be an incident to a scheme for giving one creditor a preference, or for enabling a member of the firm wrongfully to appropriate assets which should be applied in payment of partnership debts, or where the conversion of joint into separate assets is a result contemplated, and is the motive, or one of the motives of the act of dissolving the firm, the act may be avoided by the joint creditors. (*In re Waite & Crocker*, 1 N. B. R., 373.)

The correctness of the ruling in *re Boothroyd & Gibbs*, 14 N. B. R., 223, cannot be questioned, namely: "That the purchase by an insolvent trader of a homestead upon the eve of bankruptcy with knowledge of his insolvent condition and for the purpose of placing the property beyond the reach of process, is a legal fraud, which no Court should hesitate to hold void as to creditors." Advancing a step further, where a copartnership is insolvent, or is possessed of assets not more than adequate for the payment of debts, one member of the firm cannot, upon retiring, rightfully withdraw beyond the reach of creditors and to their injury a portion of the assets or property, and make a personal appropriation of those assets by putting them in the shape of a homestead.

Under such circumstances, though it takes the form of a homestead, the property is as much within the reach of a Court of Equity as before; and no such change in its form or character can give it new sacredness or endow its possessor with new privileges in its ownership or use.

Keeping in view the principles thus stated, the question now is, whether upon the facts, the transaction between Sauthoff & Olson is one which must be condemned as a fraud in fact or law upon their creditors.

Without referring to the circumstances in detail bearing upon the point, it may be first stated, that the evidence does not show that there was any actual intended fraud in the act of dissolution. Although the interest of the retiring partner, based upon the estimated value of their assets, was greatly exaggerated, I think the intent of the parties in dissolving

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their business relations, as disclosed by the testimony, was honest and that positive bad faith is not to be imputed.

Admitting this to be true, the question still remains, whether their actual pecuniary condition was such as to justify the withdrawal by Olson of the assets which were taken by him when the partnership was dissolved. The amount so withdrawn was two thousand four hundred dollars. He took two thousand six hundred and fifty dollars in book accounts. Of these he collected one thousand four hundred dollars, and returned the balance to the assignee. It is true that the one thousand dollars paid him in cash by Sauthoff was then raised by loan on pledge, as collateral security, of a mortgage on Sauthoff's homestead, held by his brother. But, subsequently, the holder of that mortgage as such security, having obtained judgment against Sauthoff for the one thousand dollars, it was held by this Court that Sauthoff's brother, as the assignor of the mortgage, stood in the position of a surety, and was entitled as such to protection; and there having been an execution levy under the judgment upon Sauthoff's stock, it was ordered that the one thousand dollars be paid in full from the general fund; so that ultimately it came from the assets of the concern and to that extent in fact diminished them. Now the question is, keeping in view the rights of creditors, was the actual pecuniary condition of this firm such as to entitle the retiring partner to appropriate the amount of their assets which he in fact received and to place them in the form of exempt property?

In settling this question, the principle we must apply is, that if a retiring partner takes out a portion of the assets of the firm for his individual use, he must do so without impairing the fund to which the creditors have the right in Equity to look for payment; and it must be made clearly to appear that such remaining fund is ample. If such partner receives more than his interest in the surplus after payment of the firm indebtedness, Equity must treat it as a wrong to creditors, and this Equity cannot be avoided by the fact that the partners believed that enough remained to pay the partnership debts,

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if, in fact, after making such appropriation in favor of one or both partners, the remaining assets prove insufficient.

The results to be reached one way or the other in this case, depend, of course, upon what shall be the determination as to the sufficiency of the assets of the firm left by Olson for the payment of the partnership debts. On their face, the book accounts of the firm amounted to between nine thousand and ten thousand dollars, and this was the value placed upon them by the parties. But that they erred greatly in judgment is demonstrated by the fact that only about two thousand eight hundred dollars of the accounts have thus far proved of any value, and of this amount the assignee has received about one thousand four hundred dollars, the bankrupt Olson retaining the balance. What further moneys may be derived from such of the accounts as are uncollected is not now known.

Concerning the value of the stock of goods of which the parties were possessed at the time of the dissolution, it is quite impossible upon the present testimony to arrive at a satisfactory conclusion. Complications in this connection arise, because of the fact that no distinction has been preserved in the bankruptcy proceedings between the debts of the firm and those incurred by Sauthoff subsequently to the dissolution. Goods purchased by Sauthoff on his individual credit were mingled with the original stock, debts were paid by him from the common fund, without regard to those contracted by the firm and those contracted by himself; the sale made by the assignee included goods on hand at the dissolution and those purchased subsequently, and, so far as distribution has been made, no distinction has been observed between the firm creditors and the subsequent individual creditors of Sauthoff.

Of course no part of the moneys which it may be determined Olson should restore can rightfully be used in the payment of individual liabilities incurred by Sauthoff subsequently to the dissolution. And in view of the necessity of ascertaining with accuracy the value of the assets of Sauthoff and Olson at the time the copartnership was dissolved, I shall direct a further reference to take testimony upon that question. Hav-

In re Kimball et al.

ing settled the principles upon which the rights of the parties are to be determined, upon the coming in of that testimony it can be ascertained what amount, if any, should be restored to the fund by Olson for application upon the partnership indebtedness.

It has been urged by counsel for respondent that, by their course of dealing with Sauthoff, selling him goods, giving him fresh credit and permitting such goods to be mingled with the old stock, the creditors must be held to have ratified the transaction between Sauthoff and Olson, and are now estopped from asserting a claim upon the property withdrawn by the latter from the assets of the firm. But it cannot be claimed that the action of the creditors operated to release Olson from liability for the firm indebtedness, and I fail to see how their subsequent dealing with Sauthoff so far sanctioned the appropriation by Olson of the moneys he took out of the firm as now to deprive them, if it shall be found that the remaining assets were insufficient to pay their debts in full, of the right to follow those moneys.

The present order will be, that the case be referred to the Register to take testimony and ascertain what was the fair actual value of the assets of the firm of Sauthoff & Olson at the time of the dissolution of that firm, the value of the stock in trade, fixtures and book accounts to be separately stated. Also to ascertain what proportion of the stock of goods sold by the assignee was held by the firm at the time of dissolution, and what was the amount and value of the goods purchased by Sauthoff on his individual account subsequent to the dissolution.

UNITED STATES DISTRICT COURT—W. D. MICHIGAN.

SEPTEMBER 8, 1877.

Delivery of schedules is not necessary to the validity of an assignment for the benefit of creditors.

A delay of more than three months in filing the petition in bankruptcy after

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the execution and delivery of an assignment for the benefit of creditors, will deprive the assignee in bankruptcy of the right to the possession of the property assigned.

In re KIMBALL, AUSTIN & CO.

Case made by the common law assignee and the assignee in bankruptcy as to the right to possession of assets.

Dallas Boudeman, for the common law assignee.

Mason, for the assignee in bankruptcy.

WITHEY, J.—On the 31st of March last the bankrupts made a common law assignment to F. W. Curtenius, for the benefit of creditors, which was on the same day accepted. Schedules were referred to in the instrument to be thereafter delivered, but were not completed and delivered until April 20th. July 11th a petition in bankruptcy was filed, on which the firm were adjudicated bankrupts.

C. H. Booth was elected assignee and to him was transferred by the Register the assets of the bankrupts. As assignee in bankruptcy Booth demanded of Curtenius the property claimed by the latter under the voluntary assignment. The parties have made a case for the opinion of the court, and counsel have been heard.

But two questions are presented. 1. Were the schedules necessary to the validity of the assignment to Curtenius at the time it was delivered? We answer in the negative. There is no claim but that the deed of assignment to Curtenius was made in good faith for the purposes expressed in it. It is not denied but that the intention is manifested in the instrument that it should take immediate effect and cover all the property of the assignors not exempt by law. Under such a condition of facts the absence of the schedules would not defeat the deed taking effect presently. Such has been held to be the law in this and several States. In *Hollister v. Loud*, 2 Mich. 309, at page 322, the Court says: "The property vested on the delivery of the deed, whether the schedules were perfected

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or not." In *Nye v. Van Huse*, 6 Mich. 329, it was held that a schedule detailing at large the property conveyed was not necessary to the validity of an assignment. The deed of the assignment in that case in general terms conveyed all the assignor's property "of every name and nature whatever as the same is more particularly described in the schedule *proposed* to be hereafter annexed to this instrument." It was held that the instrument manifested an intention that it should presently operate—and that it did take effect on delivery notwithstanding schedules were not annexed. [See also out of many cases: 15 Connecticut, 152; 21 Maine, 245; 17 N. Y., 478; 26 Ind., 242; 6 Iowa, 61.]

2. Did the delay of three months and more in filing the petition in bankruptcy, after the execution and delivery of the voluntary assignment to Curtenius, deprive the assignee in bankruptcy of a right to the possession of the property so assigned? This question is answered in the affirmative. In the absence of the bankrupt act it is, as we understand, conceded that the deed of assignment to Curtenius would be valid. It certainly would be unless fraudulent upon some ground not suggested by the facts presented to the court. The bankrupt act declares all transfers by an insolvent debtor made within certain periods next prior to commencement of proceedings in bankruptcy against him void, in certain cases. As to assignments for the benefit of creditors generally, by insolvents, the period was six months under the law prior to the amendment of 1874—and three months as the law now is. That is, if the proceeding in bankruptcy was commenced within six months after a voluntary assignment by the debtor, under the law previous to June 22, 1874, or within three months since the amendment of that date, the assignee in bankruptcy could avoid the voluntary assignment and possess himself of the bankrupt's assets so transferred. There has been some conflict in the decisions whether assignments voluntarily made by a debtor for the benefit of creditors generally, were opposed to the bankrupt act, but in this circuit the late Mr. Circuit Judge Emmons, in *Globe Insurance Co. v. Cleveland Insurance Co.*,

Isett v. Stuart.

14 N. B. R., 311, held that such assignments, if made within the period limited by the bankrupt law of six months, were opposed to the policy of the act and void as against the assignee in bankruptcy.

If, however, the voluntary assignment is made more than six months under the former statute, or three months under the amendment of 1874, there is no reason why the voluntary assignment will not vest in the assignee under it the property transferred, and effectually defeat all claims upon it by the assignee in bankruptcy.

Three months is by the amendment of 1874 substituted for six months in the original act. As to the six months clause, as it stood prior to June 22d, 1874, the Supreme Court, in *Mayer v. Hillman*, 13 N. B. R., 440, 1 Otto 496, held a voluntary assignment by an insolvent debtor, made more than six months prior to filing the petition, valid against the claims of an assignee in bankruptcy. The same rule applies to the time of three months as now limited.

The assignment by Kimball, Austin & Co. to Curtenius was more than three months anterior to the proceedings in bankruptcy against them, and therefore vested title in Curtenius as assignee for the benefit of creditors. The assignee in bankruptcy has no more right to the property thus assigned than to any other property sold by the bankrupts more than three months before the filing of the petition in this court against them.

A decree will be entered in accordance with the views expressed.

SUPREME COURT—ILLINOIS.

SEPTEMBER, 1875.

State courts have jurisdiction of actions brought by an assignee in bankruptcy to set aside mortgages alleged to have been made in fraud of the Bankrupt Act.

Personal service made upon one of the members of an insolvent firm out of

Isett v. Stuart.

the jurisdiction of the District Court, in which the petition is filed, is not sufficient to give the Court jurisdiction to adjudicate as against the party so served.

The jurisdiction of the Bankrupt Court may be impeached in collateral actions.

EDWARD B. ISETT v. JOHN M. STUART.

The facts appear in the opinion.

J. Scott Richman and Osborn & Curtis, for the appellant.
Charles A. Peabody and Connelly & McNeal, for the appellee.

SCHOLFIELD, J.—John M. Stuart, assignee in bankruptcy of Thomas M. Isett, exhibited his bill in chancery against Thomas M. Isett and Edward B. Isett, to set aside a mortgage from the former to the latter, alleged to have been made in fraud of the Bankrupt Act.

Notice was given to the defendants in the bill by publication, and decree rendered by default in favor of the complainant; but appellant was subsequently, on his petition, permitted to appear and defend, whereupon he filed an answer, putting in issue the material allegations of the bill, denying that the mortgage was made in fraud of the Bankrupt Act; that Thomas M. Isett was ever legally adjudged a bankrupt, or that the court, assuming to so adjudge, had any jurisdiction for that purpose, and alleging that the mortgage was made in good faith, without notice of any proceedings in bankruptcy, for a full, valuable consideration. Evidence was heard, and the court, thereupon, reaffirmed its former decree, with the modification that the mortgage be held void only as against the complainant's rights in the land. It is objected that the court below had no jurisdiction of the subject-matter of litigation; that the remedy of the complainant was in the Federal courts exclusively, because State courts have no jurisdiction to aid in the enforcement of the bankrupt laws of the United States.

We have been unable to find any decision of the Supreme

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Court of the United States on the question, and there are decisions by State courts of the highest respectability both ways. *Voorhies v. Frisbie*, 8 N. B. R., 152; 25 Mich., 476; and *Bingham v. Claflin*, 7 N. B. R., 412; 31 Wis., 607, sustain the objection, while *Cook v. Whipple*, 9 N. B. R., 155; 55 N. Y., 150; *Stevens v. The Mechanics' Savings Bank*, 101 Mass., 109; *Ward v. Jenkins*, 10 Metc., 583; *Hastings v. Fowler*, 2 Carter (Ind.), 216; *Brown v. Hall*, 7 Bush, 66; *Mays v. Manf. Nat. Bank*, 4 N. B. R., 660; 64 Pa., 74; and *Cogdell v. Exurm*, 10 N. B. R., 327, 69 N. C., 464, hold it untenable; and, we think, they announce the correct rule.

Circuit courts, in this State, have general jurisdiction of all cases at law and in equity, and this without regard to the origin of the right or source of title. Titles derived from the general government, and contracts made in other States or in foreign governments, are the frequent subject of litigation, without question of the jurisdiction of the courts. No question is made of the right of Congress to enact a general bankrupt law, or that, when enacted, it is obligatory upon all the citizens of all the States and all the territories in the Union.

Being thus obligatory, no State court can nullify it or refuse to enforce it in a proper case. It makes the execution of a deed or a mortgage, although in good faith, after the filing of the petition in bankruptcy, fraudulent and void as to creditors.

If a deed or mortgage be made without a sufficient valuable consideration, and creditors are thereby defrauded, it is conceded a court of equity has jurisdiction, at the suit of an assignee in bankruptcy, to set it aside.

The only difference between such a case and the present, is in the elements which render the conveyance fraudulent in law. If, therefore, it be true that the jurisdiction of the court is not limited by the origin of the right or the source of the title, it is impossible that it can make any difference whether the law, by virtue of which the instrument is declared void, is the common or statute law of the State or the statute of the

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United States. In either case it is the supreme law of the land, fixing the rights of the parties in regard to the property in litigation.

In cases affecting the rights of individuals under the laws relating to the sales of the public lands, the laws relating to patents and copyrights, and in many other cases, in determining the ownership of property or rights under contracts, it is indispensable that the State court shall ascertain and determine what the rights of the parties are, as defined by the acts of Congress, under which they originate. It has never been supposed this was an usurped jurisdiction, but it has always been conceded that, in such cases, the State courts act upon subject-matters within their jurisdiction, and adjudicate rights as determined by laws which, although not enacted by the State legislature, are, nevertheless, supreme, and, therefore, as obligatory in respect to persons and property affected by them within the State, as are laws enacted by the State legislature in relation to matters where its authority is supreme with reference to persons and property affected by them.

This is not an attempt to administer the bankrupt law through a State court, but simply to ascertain and declare the rights of parties with reference to property, after an adjudication in bankruptcy in the proper court and in consequence of that adjudication.

We cannot yield our assent to the position, although it has been assumed by courts for which we entertain profound respect, that the question involved is, whether we shall enforce the penal laws of the United States. Wherein does the enforcement of rights, as determined by the Bankrupt Law, differ in principle from the enforcement of rights as affected by the statutes for the prevention of frauds and perjuries? We are unable to discover any distinction. Under both, certain contracts that would otherwise be held valid, cannot be enforced, and the rule of evidence is so changed as to make certain things evidence of fraud, which were not so deemed by the common law. No penalty is, in either case, imposed for doing or not doing—but in both, the doing of the thing is

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simply prohibited, and no right can be enforced in violation of the prohibition.

The petition under which the adjudication in bankruptcy was had, was addressed to the Hon. Samuel Blatchford, Judge of the District Court of the United States for the Southern District of New York, by which court the judgment was rendered. The petition was filed by partners of Thomas M. Isett, praying that the members of the firm be declared bankrupt. Isett refused to join in the petition, and the only notice he had of the proceeding was by personal service made on him in Jersey City, in the State of New Jersey, beyond the jurisdiction of the Circuit Court of the United States for the Southern District of New York.

Was this service sufficient to give the court jurisdiction to adjudicate as against Isett? Section 36 of the Bankrupt Act provides that a partnership may be declared bankrupt upon the petition of one or more of its members. Section 10, of the same act, authorizes the justices of the Supreme Court of the United States to frame general orders for regulating the practice and procedure in bankruptcy. Under this authority they framed order No. 18, which is as follows:

"In case one or more members of a co-partnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the copartnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law, and by these rules in the case of a debtor petitioned against." Section 40, of the Bankrupt Act, provides how notice shall be given a debtor petitioned against, as follows: "A copy of the petition and of such order shall be served on such debtor by delivering the same to him personally, or leaving the same at his last usual place of abode, or if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication, in such manner as the judge may direct. No further proceedings, unless the debtor appear and consent thereto, shall be had until proof

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shall have been given, to the satisfaction of the court, of such service of publication." In *Stuart, assignee, v. Hines*, 6 N. B. R., 416, 33 Iowa, 60, the Supreme Court of Iowa held this particular service good, on the ground that personal service might be made anywhere.

The court thought it impossible it could be said Isett was not found, because the return showed he was found, and, therefore, if such service was not good, no service could have been made on him. We are unable to yield our assent to this conclusion. This statute, as we think, should receive a like construction as is given to statutes having similar provisions in relation to attachment and chancery proceedings in State courts. We are not aware that it was ever held in any case, under such a statute, that it is necessary to pursue the party wherever he may be heard of, to lay a basis for a return or an affidavit that he cannot be found.

The process of the court has vitality, and may be enforced wherever its jurisdiction extends, but beyond this it has no validity. The words, "not found," in such cases, are to be understood with reference to the place where there is authority to make service, and it is not to be presumed that search is to be made elsewhere. We are clearly of opinion there was no authority to make service of the writ beyond the jurisdiction of the court issuing it, and that the return, "not found," could have been lawfully made when it was ascertained Isett was beyond the limits of the Southern District of New York. The same view has been expressed by the Circuit Court of the United States for the Fifth Circuit, in the case of *Ala. and Chat. R.R. Co. v. Jones*, 5 N. B. R., 97; Bump on Bankruptcy, 6 Ed., 623.

But it is contended, the law did not require that any service of notice should be made on the non-consenting partner, and the order of the justices of the Supreme Court does not repeal the law.

The proceeding was adverse to the non-consenting partner, and upon principle he was entitled to notice. We regard the order itself as a judicial construction by the highest tribunal

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having authority to adjudicate upon the question, that the non-consenting partner is, by the spirit of the act, in the same situation as the debtor petitioned against, and therefore entitled to the same notice. However, by Section 14 of the Bankrupt Act, it is provided that "a copy duly certified by the clerk of the court, under the seal thereof, of the assignment made by the judge or register, as the case may be, to him, as assignee, shall be conclusive evidence of his title as such assignee to take, hold, sue for and recover the property of the bankrupt," etc. And it is insisted that this section prohibits all inquiry into the jurisdiction of the court.

This is not tenable. If there was no jurisdiction, there could be no judgment, and hence, no assignment. All orders to that effect would be nullities. The question of jurisdiction was proper to be inquired into, and would have been so even had the record on its face have shown that the court had jurisdiction, according to recent rulings of the Supreme Court of the United States. (*Thompson v. Whitman*, 18 Wallace, 457; *Knowles v. Gas Light & Coke Co.*, 19 Id., 58.) Our conclusion is, the court had no jurisdiction to adjudge Isett a bankrupt, and that all proceedings thereunder were therefore void. That the service was made in Jersey City, is shown by the face of the record, and any presumption that might possibly arise that the court had other and sufficient evidence of lawful service before it, is excluded by positive proof that no other service was made. The decree of the Court below is reversed.

Decree reversed.

UNITED STATES DISTRICT COURT—CALIFORNIA.

Where the bankrupt at the time of giving a mortgage, in pursuance of a previous agreement, to secure a pre-existing debt, requests the creditor to permit him to secure other creditors in such instrument, such request is notice of the existence of such creditors and of the bankrupt's inability to pay them.

A creditor who has obtained a preference is chargeable with knowledge of

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facts, the existence of which he could have ascertained by the slightest effort.

It is not necessary that the creditor should know that the law prohibits him from taking the preference; it is enough if he knows such facts and circumstances as bring it within the prohibition of the law and make it a fraud in legal contemplation.

An oral promise, made at the time the debt is contracted, to give security if required, cannot be executed after the debtor has become insolvent.

JOHN LLOYD, Assignee, &c., v. J. H. STROBRIDGE.

HOFFMAN, J.—It cannot, I think, be doubted that the bankrupt was in a condition of utter insolvency at the time he executed the mortgage which the bill seeks to set aside.

The real questions in the case are: Did the defendant have reasonable cause to believe that the bankrupt was insolvent, and did he know that a fraud on the act was intended?

1. The notes given for the original advances by defendant had remained unpaid for about two years.

No part of the interest had been paid, except six hundred dollars, which was credited on account of interest then due, and which was the price of some horses sold by the bankrupt to the defendant. The latter states that he supposed that the interest accruing on other indebtedness was kept down by the profits arising from the milk ranchos which the bankrupt was operating. But he was fully aware that the latter was unable to pay the interest on the notes held by himself. He was also aware that the bankrupt owed debts to a very considerable amount, which he was unable to pay; for he was urged by the bankrupt to accept a joint mortgage to himself and two other creditors, which he refused, and insisted on the fulfilment of the bankrupt's promise to give him a first mortgage on the distillery premises.

That the defendant had no accurate and detailed information as to the resources and liabilities of the bankrupt may be admitted.

But the request of the bankrupt, to be permitted to secure other creditors in the instrument to be executed to the defendant, was notice to him of the existence of those creditors and of the bankrupt's inability to meet their demands. The cir-

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cumstance that he demanded the mortgage which the bankrupt had promised to execute to him at any time when "he felt scared or dubious about his loan," and the fact that he asked for security, and not for a payment of a long over-due debt, indicate a knowledge on his part of his debtor's inability to satisfy his indebtedness.

The bankrupt seems to have entertained sanguine and, perhaps, visionary expectations of success in his distilling operations, under a patent in which he was interested, and hoped to extricate himself from his embarrassments by forming a stock company, and obtaining, by the sale of the stock, the means of paying his debts and carrying on his business.

But this project seems to have failed—at least so far as the defendant and his friends were concerned, and it was only on their definitive refusal to embark in the enterprise that the promised security was exacted.

The slightest inquiry would have apprised the defendant of the bankrupt's real condition; for he seems to have been known, to almost all who had dealings with him, except the defendant, to be "hard up," or impecunious.

The defendant had no right to wilfully close his eyes to facts, the existence of which he could have ascertained by the slightest effort.

I think that all the circumstances of the case, taken together, lead irresistibly to the conclusion that at the time this defendant received his mortgage, he not only had reasonable cause for believing, but was morally certain, that the debtor was insolvent.

If so, it follows that he knew, or is charged with the knowledge that he had no right to give a preference to any of his creditors, and that in doing so he committed a fraud upon the act. Of course, it is not meant that either of these parties was guilty of any moral delinquency. They no doubt considered it fair and just that the debtor should redeem the promise made when he obtained his advances, to give security if required. But if the law forbade his fulfilment of that prom-

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ise, and if in doing so he has given a preference, the transaction is in fraud of the act, and must be annulled.

It is not necessary that the creditor should know that the law prohibited him from accepting the preference, for, otherwise, ignorance of the laws could always be set up as a defence of the transaction. It is enough if the creditor knows such facts and circumstances as bring the act within the prohibition of the law, and make it a fraud in legal contemplation.

If I am right in these views, the security given in this case can only be sustained by virtue of the previous promise of the bankrupt to execute it.

Whatever may be the law in England, it is settled in this country that a general promise, made at the time the debt is contracted, to give security if required, cannot be executed after the debtor has become insolvent. (*Bank of Leavenworth v. Hunt*, 4 N. B. R., 616, 11 Wall., 394; *In re Graham*, 3 N. B. R., 370; *Ex parte Ames*, 7 N. B. R., 230; *In re Jackson Manufacturing Co.*, 15 N. B. R., 438.)

And this is for the obvious reason that such a promise is merely a promise to give a preference if a preference should be called for.

In *ex parte Ames* (*ubi sup.*) Mr. J. Lowell seems to have inclined to the opinion that "a specific and definite security, unconditionally stipulated for in writing, may be given after a lapse of time and a change of circumstances."

In *re The Jackson Manufacturing Co.*, it is suggested that perhaps the security given on the faith of a contemporaneous oral promise to give a definite security might be sustained, on the ground that the money advanced was so far a part performance of the contract as to entitle the creditor to a specific performance.

But the decisions in England and America are nearly uniform, that payment of the purchase money is not of itself sufficient to take an oral promise to convey land out of the statute of fraud. Admission into possession, expenditure of money in meliorations of the estate, payment of increased rent, or the like, have always been required.

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"I take it," observes Lord Redesdale, "that nothing is to be considered as part performance that does not put the party into a situation that it is fraud upon him unless the agreement is performed. For instance: if, upon a parol agreement, a man is admitted into possession, he is made a trespasser if there be no agreement.

* * * * *

"Payment of money is not part performance, for it may be repaid, and then the parties will be just as they were before, especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for, in the case of *Foxcroft v. Lyster*, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent." (*Clinan v. Cook*, I. S. & L., 41.)

The learned editors of *Leading Cases in Equity* observe, in their note to *Lester v. Foxcroft* (Lead. Cases in Eq., vol. 1, part II., page 1054): "It is fully settled at the present time that payment of the purchase-money is not, of itself, sufficient to withdraw a parol agreement from the operation of the statute, because the money may be recovered back at law." And for this numerous authorities are cited.

If this be the law, it results that the oral promise made by the bankrupt, to give a mortgage on the distillery, created no equitable charge or lien upon it, and the contract was not one which a court of law or equity would enforce *in invitum*.

The creditor, therefore, had, by reason of that promise, no legal or equitable right to insist upon a preference over other creditors.

If he has chosen to postpone his demand that the promise should be executed until the bankrupt was in a situation where the law forbade him to fulfil it, he must accept the consequences of his own indulgence or neglect.

Let a decree be entered accordingly.

In re Doty.

UNITED STATES DISTRICT COURT—MINNESOTA.

AUGUST 22, 1877.

No debt can be proved on which an action could not be maintained against the bankrupt in the State where the petition is filed, in case bankruptcy proceedings were not instituted.

In re A. J. DOTY.

I, Henry C. Butler, one of the registers of said court in bankruptcy, do hereby certify that, in the course of the proceedings in said cause before me, the following question arose pertinent to said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Messrs. *Start & Gove*, who appeared for the assignee of the bankrupt, and opposed the allowance of the claim hereinafter described, and Messrs. *Jones & Gove*, who appeared for Tennis S. Slingerland, and one of the creditors of said bankrupt.

The said Tennis S. Slingerland, on the 15th of March, 1877, made and filed his proof of debt for \$734.24, and such proof of debt and claim against the estate of said bankrupt is predicated upon two promissory notes made by said bankrupt to said Slingerland; one of which was made and delivered on the 3d day of July, 1868, for the sum of \$179, with interest at 12 per cent. per annum, payable in one year from said date; the other was made on the 5th day of August, 1869, for the sum of \$194.71, with interest at the rate of 12 per cent. per annum, and was payable in one year from that date. The note first above described became due and payable on the 6th day of July, 1869, and the other on the 8th of August, 1870. No payments have been made on said notes, or either of them. At the time when the said notes were given, both the said Tennis S. Slingerland and the said bankrupt were, ever since have been, and now are residents of the State of Minnesota.

The said claim, demand, and cause of action of the said Tennis S. Slingerland against the estate of said bankrupt did not accrue within six years next before the filing of the peti-

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tion in bankruptcy by the said bankrupt; neither did any part of said claim, demand and cause of action accrue within six years next before the filing of said petition.

Upon said proceedings, and upon the foregoing facts as stated and agreed to by the counsel for the opposing parties, the following question of law arose as agreed to by said counsel:

Can a claim which is barred by the statutes of limitation of the State of Minnesota, be proved so as to entitle the holder to share in the estate of a bankrupt when both the creditor and the bankrupt reside in said State, and have resided therein ever since the debt was contracted, and the debt was contracted therein?

And the said parties requested that the same should be certified to the judge for his opinion thereon.

Dated at Rochester, August 20th, 1877.

HENRY C. BUTLER,

Register in Bankruptcy.

NELSON, J.—I answer the question certified in the negative, and agree to the conclusion reached by the learned judge of the Massachusetts District. (*In re Daniel P. Kingsley*, 1 N. B. R., 329.) The rule that no debt may be proved in bankruptcy on which an action could not be maintained against the bankrupt in the State where the petition is filed, in case bankruptcy proceedings were not instituted, commends itself to my judgment.

The statute of Minnesota provides that an action could "only be commenced" to enforce the debt referred to in the question certified within six years.

The construction by the Supreme Court of the State of this statute is, that the bar is complete and the statute need not be pleaded. The fact that it appears upon the face of a complaint that the cause of action is barred by statute, is good ground for demurrer, and for reversal of a judgment upon a writ of error. (11 Minn., 320.)

In re Boyd.

UNITED STATES CIRCUIT COURT—OREGON.

SEPTEMBER 4, 1877.

In ascertaining the validity of the docket entry of a judgment the whole entry is to be looked at, and if from the whole the amount and date of the judgment, the parties and the Court in which it was rendered appear, the entry is sufficient.

While a judgment record cannot be resorted to in order to supply omissions in the docket entry, it may be examined to test the validity of such entry.

In re HAMILTON BOYD.

Wm. H. Effinger and G. W. Yocum, for the creditors.

John Catlin, for the assignee.

FIELD, J.—I agree with the district judge that the judgment recovered by Goodnough would only become a lien upon the real property of the bankrupt by its entry in the judgment docket in the clerk's office of the county where the property is situated. This lien is the mere creature of the statute, and to its existence the provisions of the statute must be followed in all substantial particulars. The docket must disclose, among other things, the amount and date of the judgment, and the Court in which it was rendered. Mere numerals, without any indication that they represent dollars or other denomination of money, are not sufficient. Any omission in this particular cannot be supplied by reference to the record of the judgment. The object of the law is to render the judgment a lien upon the real property of the debtor in any county where it is situated; and as such county may be at a great distance from the county in which the judgment is rendered, the law contemplates that the docket shall impart knowledge of all the facts which a purchaser of the property need ascertain. But the whole entry of the docket is to be looked to, and not merely a single item of it; and if from the whole, the amount and date of the judgment, the parties to it, and the court in which it was rendered appear, the entry will be held sufficient. In this case all the

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essential particulars are specifically stated, except one. The word dollars and the usual mark indicating dollars are both omitted in stating the amount of the judgment. But this omission is supplied by the accompanying entry, which is properly a descriptive part of the judgment—that seven thousand and five hundred dollars of the amount stated in the judgment draws a certain specified rate of interest. The natural and necessary inference is that the balance of the amount expressed by the numerals was also in dollars.

In describing the judgment the statement of the rate of interest which a part of the amount is made to draw, where that exceeded the interest prescribed by law in the absence of any special agreement, was properly made.

It follows that that portion of the decree of the District Court which holds that the judgment of Goodnough is not to stand with the assignee as a secured debt, is reversed; and it is ordered that the judgment be taken by the assignee as a debt secured by the real property upon which it is a lien.

But as to the judgment recovered by the Bank of British Columbia, the case is different. For although a judgment record cannot be resorted to, in order to supply the omissions of a docket entry, it may be examined to test the validity of such entry. Looking at the record of judgment of the bank, we find that it is restrained from enforcement against the separate property of the bankrupt. It cannot therefore become a lien upon his separate property by its entry on the docket. The decree of the District Court as to that judgment is therefore affirmed.

SUPREME COURT—NEW HAMPSHIRE.

AUGUST, 1877.

Provable debts, although created by fraud, are discharged by a composition in bankruptcy.

WELLS v. LAMPREY.

THE action is covenant. The writ was dated April 10, 1876.

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The defendant conveyed to the plaintiff certain premises, covenanting that they were free from all incumbrances. They were, in fact, subject to a mortgage, which the plaintiff was compelled to pay, and this action was brought to recover the amount of such payment. The defendant pleaded a discharge in bankruptcy, by a composition. The plaintiff replied that the debt was created by the fraud of the defendant.

Mr. *Spring*, for plaintiff.

Mr. *Murray*, for defendant.

STANLY J.—The question here presented is as to the effect of a discharge in bankruptcy, by a composition, by which we understand that, under the act of June 22, 1874, the defendant compounded and settled with his creditors, one of whom was the plaintiff:

The provision of law bearing on this question is as follows: "In all cases of bankruptcy, now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to such known creditor, of the time, place and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition, proposed by the debtor, shall be accepted in satisfaction of the debts due to them from the debtor; and such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting, either in person, or by proxy, and shall be confirmed by the signatures thereto, of the debtor, and two-thirds in number and one-half in value of all the creditors of the debtor. * * * The provisions of a composition accepted, by such resolution, in pursuance of this section, shall be binding on all the creditors, whose names and addresses and the amount of the debts due to whom are shown, in the statement of the debtor, produced at the meeting at which the resolution shall have been passed, but

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shall not affect or prejudice the rights of any other creditors." (U. S. Stat., 1 Sess. 43 Cong., 182, § 17.)

No question is raised as to whether or not the plaintiff's debt is provable in bankruptcy, nor that his name and residence, with the amount of his claim was duly inserted in the list of claims furnished by the defendant, under the provisions of the act in question, and the case finds that the plaintiff received the amount proposed by the resolution for a composition.

Upon these facts, we think the plaintiff is not entitled to recover. It will be observed that the statute, under consideration, does not exempt from its operation any class of debts. It, in terms, declares that the composition or settlement shall be binding "on all the creditors whose names and the amount of whose debts are mentioned in the statement produced at the meeting at which the resolution has been passed." This provision is not in amendment of, or a substitute for the provisions of the revised statutes, but is in addition to them. Under this provision the debtor receives no discharge. He makes a settlement of his debts under the supervision and with the sanction of the court, and that settlement is declared to be binding. It is as if the debtor went to each creditor and offered him a certain percentage to discharge his claim against him,* and the offer was accepted. The only difference in the two cases is, that under the act in question, the amount paid is uniform, and a certain portion of the creditors may compel the balance to discharge their claims, whether they are willing to do so or not.

By the adoption of the resolution for the composition, and its approval by the court and the payment of the amount proposed, the claims of all those whose names, residences and the amount of whose debts appear in the statement are absolutely discharged, and all right of action thereon is thereafter forever barred. No other discharge is necessary. The record of the adoption of the resolution and the evidence of payment are all that is required. (*In re* Bechet, 12 N. B. R. 201; *In re* Trafton, 14 N. B. R. 508.)

Case discharged.

Player, Assignee, v. Lippincott et al.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

SEPTEMBER 6, 1877.

Where a creditor accepts and records a chattel mortgage, correctly describing the note secured, in place of a prior unrecorded mortgage incorrectly describing such note, such transaction does not constitute an illegal preference, but is a simple exchange of securities.

PLAYER, Assignee, v. LIPPINCOTT et al.

THIS was a bill in equity to set aside a chattel mortgage.

The bill alleged the bankruptcy of B. R. Lippincott by creditor's petition, filed January 9th, 1877; that Charles Lippincott and James Patterson, as co-partners under the style of Charles Lippincott & Co., and doing business in Philadelphia, were creditors of B. R. Lippincott (a brother of Charles), a manufacturer of soda water in St. Louis, in the sum of \$14,480.92; that B. R. Lippincott executed a chattel mortgage to secure a note for said amount, to his brother's firm, on his stock and fixtures, extracts in syrup-room, etc., tools and stock in copper-shop, boilers, machinery and apparatus used by him in the manufacture and sale of soda water; that said note and mortgage were dated August 28, 1876; that the mortgagor and mortgagees agreed that said mortgage should not be placed on record, except in the event that B. R. Lippincott's creditors should press their claims against him; that pursuant to such agreement said mortgage was not placed of record until B. R. Lippincott's "insolvency was about to become notoriously public, namely, on the 18th day of November, 1876, when the same was filed and recorded;" that a part of the property mortgaged was stock in trade of the mortgagor, of which he "kept continually selling portions," and replenishing the same with new purchases, and that it was the agreement, intention and purpose of the mortgagor and mortgagee that the mortgagor should remain in possession of the property mortgaged, carry on his usual business, and make sales of portions of all

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the property mortgaged, as the exigencies of his business might require; that the mortgagor did so remain in possession of said property and carry on his business until the bankruptcy. There were the usual allegations as to knowledge on the part of the defendants of the mortgagor's financial condition, and purpose to evade the provisions of the Bankrupt Act.

The answer admitted the bankruptcy, the indebtedness of bankrupt to defendants as co-partners, in the amount alleged, the execution of the note and mortgage; but denied any agreement or understanding that the mortgage should not be placed of record except in case of the imminent insolvency of the mortgagor. The answer further denied any agreement, or intention on the part of defendants, that the mortgagor should sell or dispose of, in the conduct of his business, any part of the mortgaged property, and denied that he had sold any part thereof. The mortgage contained the following stipulations: "The parties hereto agree, that until condition broken, said property may remain in the possession of Benjamin R. Lippincott, but after conditions broken, the said Charles Lippincott & Co., may, at their pleasure, take and remove the same, and may enter into any building or premises of the said Benjamin R. Lippincott, for that purpose. The answer further denied any knowledge on the part of the defendants of the mortgagor's insolvent condition, either on the 28th of August or the 18th of November. The defendants, in explanation of the delay in recording the mortgage, averred that at the date of the execution of the note and mortgage, defendant Patterson was in St. Louis, on his annual visit to make a settlement with B. R. Lippincott, and took the mortgage with him to Philadelphia for the purpose of exhibiting the same to his partner, before having it placed of record; that on reaching Philadelphia, it was for the first time discovered by Charles Patterson, that in copying the note into the mortgage, the word "four" had been written instead of "fourteen," in stating the amount of the note, though the amount of the debt had been otherwise correctly stated; that B. R. Lippincott was then daily expected in Philadelphia, to visit the Centennial, and it was determined to hold

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the mortgage for correction until he should come; that B. R. Lippincott did not reach Philadelphia until early in November, and while he was there a new mortgage of the same date, and, with the exception of the error in copying the note, an exact copy of the first was prepared, signed in Philadelphia by defendant's firm and B. R. Lippincott, and was taken by B. R. Lippincott to St. Louis for acknowledgment and record, and was acknowledged by him in St. Louis, November 15th, and recorded on the 18th.

Stewart & Hermann, for complainant, cited *Clafin v. Rosenberg*, 42 Mo., 439; *State v. King*, 44 Mo., 242; *Allen v. Massey*, 1 Dillon, 40; *Bryson v. Phœnix*, 18 Mo., 13; *Balke v. Swift*, 53 Mo., 86; *Fant v. Powell*, 62 Mo., 525; *Harris v. Exchange Bank*, 14 N. B. R., 510; *Robinson v. Robardo*, 15 Mo., 459; *Walter v. Winer*, 24 Mo., 63; *Eaton v. Perry*, 29 Mo., 96; *Voorhis v. Langdorf*, 31 Mo., 451; *State v. Tasker*, 31 Mo., 445; *Lodge v. Samuels*, 50 Mo., 204.

E. T. Allen and *N. Oscar Gray*, for defendants, cited *In re Wynne*, 4 N. B. R., 23; *Sawyer et al., v. Turpin et al.*, 13 N. B. R., 271; 1 Otto, 114; *Miller, assignee, v. Jones*, 15 N. B. R., 150; *Field v. Baker*, 11 N. B. R., 415; *Burnhisel v. Firman*, 11 N. B. R., 505; *Cragin v. Carmichael*, 11 N. B. R., 511; 2 Dillon, 519; *Nat. Bank of Fred. v. Conway*, 14 N. B. R., 513; *Hicks v. Williams*, 17 Barb., 523; *Thompson v. Van Vechten*, 6 Bosw., 373.

TREAT, J.—The decision in the case of *Sawyer v. Turpin*, 13 N. B. R., 271; 1 Otto, 114, is conclusive on nearly every point in this case. The prior unrecorded mortgage for which the latter was substituted, would not be upheld if the rights of intervening mortgage creditors or vendees had arisen; but in the absence of such intervening rights, the last mortgage rests for its validity on the first. The facts connected with the two mortgages may be used to throw light on the *bona fides* of the parties.

If the second is, as to date, to be referred to the first mortgage for which it was substituted, then it was not made within

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two months of proceedings in bankruptcy. There is nothing on its face to make either mortgage void. It could have no effect as to the creditors until recorded. If any of the bankrupt's creditors had pursued the property between August and November 18th, their demands might have prevailed over the alleged rights of the mortgagees; but no such rights existed, or, if so, were asserted. The intimation of the Supreme Court of Missouri, that a mortgage should be recorded within a reasonable time, has reference to cases where intervening interests arise. There is nothing on the face of either mortgage, or in the evidence, showing that the mortgagor was to have the right to sell or consume the mortgaged property for his own benefit, or, in other words, that the conveyance was for his benefit, and therefore void.

The bill is dismissed with costs.

UNITED STATES CIRCUIT COURT—COLORADO.

In Colorado the delivery of an execution to the sheriff constitutes such a lien upon the debtor's property as will be valid against proceedings in bankruptcy filed after such delivery, but before a levy is made.

BARTLETT, Assignee, v. RUSSELL.

Blake & Jacobson, attorneys for petitioner.

Thomas Macon, attorney for Russell.

MILLER, J.—In the case of the petition of Bartlett, assignee of Peabody, for review of an order of the District Court, I have given it all the consideration I shall have time to give it, and although there are conflicting authorities upon the subject, I have arrived at a conclusion satisfactory to myself, and will proceed to announce it.

The case is this: The bankrupt was sued in the State Court by Edward Russell, who obtained a judgment against him, and

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fearing that he would probably not make his money otherwise, he obtained an order from the court and had execution issued and placed in the hands of the sheriff. In about an hour after that was done, the bankrupt filed his petition in bankruptcy, and in about an hour after that the execution was levied upon the personal property of the debtor. While the sheriff was taking an inventory, however, the Marshal of the United States seems to have made his appearance and claimed the property under the orders of the District Court, and it was delivered to him. Afterwards a petition was filed in the United States District Court by Russell, asking that the proceeds of that property, which had been sold, might, as far as was necessary, be appropriated to the payment of this debt, and the District Court gave the order directing that the debt be paid out of the assets, as far as the property levied upon would pay it.

Now, for the reversal of that order, the assignee of the bankrupt has filed a petition here, and the first question is as to the jurisdiction of this court. I have some doubt about that, whether the order of the District Court may be reviewed on petition in this way. I have concluded, however, to give the petitioner the benefit of the doubt, since the whole matter seems to have been conducted in a summary way, and I am rather inclined to the opinion that this is one of those questions which may be reviewed by this form of proceeding, which may be called the extraordinary jurisdiction of the Circuit Court under the Bankrupt Law.

The question then recurs, whether the order of the District Court was correct, that the plaintiff, Russell, had established such a lien on the goods of the bankrupt, seized under the writ of execution, as required that they should be first appropriated to pay his judgment.

The question is one, or ought to be one, of the local laws of this State, because it is a question whether, under the laws of the State of Colorado, the proceedings which the plaintiff in the original suit instituted for the purpose of making his debt, created such a lien that it should be respected in the bankruptcy proceedings.

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But while you have a statute in this State upon this subject, there are no decisions construing the statute. The counsel in the argument referred to no such decisions, and my associate says there has been none in this State upon it. But the statute is one which exists, and has long existed, in other States, and is in precisely the same words as the statute of Kentucky and Illinois, and is said to have been copied from the statute of Illinois; and the counsel for the petitioner, in his argument, relies upon the decisions of the State Court of Kentucky, construing that statute. The statute is, "that no writ of *fieri facias*, or other writ of execution, shall bind the estate of the defendant or defendants, but from the time such writ shall be delivered to the sheriff, or other proper officer, to be executed." This is a limitation of the common law by which the goods and chattels of the party were bound from the time the writ was tested.

Now, I cannot go into all the authorities which were cited the other day in the argument. The argument was an able and exhaustive one, and a great many authorities were cited. The English authorities are in conflict with the authorities in this country. I can only say, in view of the principle of our bankruptcy law, that I am of the opinion that there was such a lien as gave to the plaintiff, in the action at law, the right to appropriate that money to the payment of his debts; and that there was a lien of some kind is not disputed.

Some cases were cited showing that a subsequent execution, or execution delivered to the sheriff subsequent to the first one, may appropriate property to the exclusion of the lien established by the first execution delivered to the officer.

But that whole subject was reviewed by our Supreme Court, in the case of *Waller, assignee in bankruptcy, v. James and Joseph Best*, 31 Howard, 111. That was a case concerning the effect of this statute in the State of Kentucky, and the eminent lawyer, Chief Justice Taney, after reviewing the decisions of the State Court of Kentucky, uses this language, in reference to the decisions of the State Court in the case of *Addison and others v. Crow and others*: "This is the latest

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decision in the courts of the State to which we have been referred, or of which we are aware, and, as we have already said, it appears to have been well considered. And whatever doubts might before have been entertained, we must, under the authority of this case, regard it as the settled law of the State, that the creditor obtains a lien upon the property of his debtor by the delivery of the *fiery facias* to the sheriff; that it acquires no additional validity or force by being actually levied, but that the lien is as absolute before the levy as it is afterwards, and continues while the process remains in the hands of the sheriff to be executed."

It does not become me to overrule that decision, and it was upon decisions of the State of Kentucky that the counsel for petitioners rely to show that the lien was not an absolute one.

I have read from Curtis' decisions of the United States Supreme Court, the chief value of which lies in the head notes; and his head notes, although brief, are entitled to great weight, as expressing the result of the case. He says, in the head notes to this case: "In Kentucky, the delivery of *fiery facias* to the sheriff creates a lien on the debtor's lands, which is as valid before as after a levy." Not only is that an authority which I do not feel like overruling, but it meets my approval. I think that there is a lien established by the delivery of the execution to the sheriff. The construction of our Bankrupt Law by the Supreme Court has tended very much of late years to give effect to liens established by judicial proceedings in which there was no collusion, no summary process, but a lien obtained by the orderly and regular course of judicial proceedings, and not by attachment, and such liens will be respected by the Federal Courts, in the administration of the Bankrupt Law.

The judgment of the District Court in this case is affirmed.

In re Rugsdale.

UNITED STATES DISTRICT COURT—INDIANA.

A bankrupt engaged in farming and trading live stock is not a tradesman within the meaning of § 5110 of the Revised Statutes.

In re WILLIAM RUGSDALE.

Henry C. Duncan et al., who are creditors of the bankrupt, filed specifications of the grounds of their objection to his discharge, alleging, 1. Failure and refusal of bankrupt to surrender all his property. 2. Failure to keep proper books of account. 3. Fraudulently procuring assent of creditor to discharge. These allegations being denied by the bankrupt, and issue joined thereon, the matters in controversy were referred by the Court to Noble D. Butler, Esq., one of the registers in bankruptcy thereof, for report and finding; who, after hearing the evidence, reported the testimony and the following,

Opinion of Register.

The proof does not sustain either the first or third specifications filed by the creditors. As to the second specification, it is shown that the bankrupt was engaged in farming and trading. His trading consisted in buying and selling live stock. The character of the "books of account" kept by him is revealed by his answers to questions 73, 79, 80, 81, 82, 83, and a statement by him just at the close of his answer to question 132, upon an examination under Section 5086, Rev. Stat. U. S., the record of which is introduced as part of the evidence herein. They were evidently very imperfect. He did not keep an account of all his sales, and he thinks his books would "show about two-thirds or three-quarters of his business" only. They could hardly be considered "proper books of account" within the meaning of the law (Rev. Stat. U. S., § 5110), which, while it does not enjoin any particular form of book-keeping, certainly requires that it should exhibit a full and accurate account of one's business transactions.

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But the law imposes this duty upon merchants and tradesmen. It is not claimed that the bankrupt is a merchant (who is defined to be, in one sense, a trader, by Webster, and by Burrill and Bouvier in their Law Dictionaries), but that he is a tradesman. It will be observed that this is not the same expression used in Section 5021, which makes the stoppage of payment of commercial paper by a "trader" an act of bankruptcy. According to the decision under this section, and the definition of the term by the English courts, the occupation of the bankrupt may be designated as that of a "trader." And primarily these words "trader" and "tradesman" mean one who trades, and they have been treated by the courts in many instances as synonymous. But in their general application and usage, I think, they describe different vocations. By "tradesman" is usually meant a shopkeeper. Such is the definition given the word in Burrill's Law Dictionary. It is used in this sense by Adam Smith. He says (*Wealth of Nations*), "a tradesman in London is obliged to hire a whole house in that part of the town where his customers live. His shop is on the ground floor," etc., etc. Dr. Johnson gives it the same meaning, and quotes Prior and Goldsmith as authorities. It was held by Bell, J., in 4 Penn. St. Reports, 472, to mean, in the United States, a mechanic or artificer whose livelihood depends on the labor of his hands; or, in a more enlarged sense, any person engaged in mechanical pursuits or employments; but the English definition seems to be more accurate even in this country.

The bankrupt, however, does not come within either of these descriptions of a tradesman; and, for this reason, I think that Section 5110 does not apply to him. I find, therefore, on the whole that the specifications ought to be dismissed.

Respectfully submitted,

NOBLE C. BUTLER,
Register in Bankruptcy.

GRESHAM, J.—The ruling of Mr. Register Butler is approved, and the clerk will make the proper entry.

Phelps, Assignee, v. McDonald et al.

SUPREME COURT—DISTRICT OF COLUMBIA.

JANUARY, 1876.

A claim in favor of the bankrupt against the Government will pass to his assignee.

A description in the schedule of assets of a claim for the burning of cotton in the enemy's country during the war as against the officers who destroyed the same, is substantially a statement that the claim is one against the Government.

Where a claim is marked in the schedule as worthless, the validity of a sale of the assets, including such claim, is not affected by its afterwards becoming valuable.

A bankrupt who has received his final discharge is entitled to his future acquisitions, and may use them to purchase his former assets on a sale thereof by the assignee.

The bankrupt court has no jurisdiction over property of the bankrupt in foreign countries, and cannot compel an assignment thereof by him.

THOMAS JEFFERSON PHELPS, Assignee in Bankruptcy of AUGUSTINE R. McDONALD v. AUGUSTINE R. McDONALD and WILLIAM WHITE.

The bill sets forth that in the District Court of the United States for the Southern District of Ohio, on or about the 19th day of December, 1868, the defendant, Augustine R. McDonald, filed his petition in bankruptcy, stating that he was unable to pay his debts, offering to surrender all his estate and effects for the benefit of his creditors; that on the 5th day of January, 1869, the said court appointed complainant assignee, and on the 12th day of February, 1869, the said assignee, in conformity with the act of Congress, received from the register in bankruptcy an assignment of all the estate, real and personal, of the said bankrupt, including all the property, of whatever kind, of which he was possessed, or in which he was interested, or entitled to have, on the 19th day of December, 1868, with all his deeds, books and papers relating thereto, and on the 17th day of March, 1869, a final certificate of discharge was issued to the said McDonald; that the said McDonald had a just and valid claim against the United States growing out of transactions

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between him and the Government of the United States, and of injuries done to his property by the authorities of the United States in the course of said transactions between the 13th day of April, 1861, and the 9th day of April, 1865; and the said McDonald was, and is a British subject, and diplomatic negotiations having for a long time been pending between the governments of the United States and Great Britain for the settlement of the claims of the respective citizens and subjects against the two governments respectively, a treaty was, on the 8th day of May, 1871, concluded between the governments of the United States and Great Britain, by which provision was made for the appointment of a commission to examine and adjudicate all claims by the subjects and citizens of either power against the government of the other, with certain limitations, which commission was duly organized, and proceeded to hear and determine such claims; and the said McDonald prosecuted his said claim, and the said commission made an award, which is set forth fully in the opinion; that, in pursuance of said award, the sum of \$197,190 will be paid from the Treasury of the United States, through some agent of her Britannic Majesty's Government, in the city of Washington, in the District of Columbia, on or immediately after the 26th day of September then next, to the said McDonald, and by him will be received to his own use, unless prevented by the interposition of this court. The bill then states the claim of the said McDonald to be of the following character: The said McDonald, in the year 1864, having received the promise of protection and necessary permits from the Treasury Department of the United States, authorizing him to purchase cotton in the insurrectionary States, and an autograph letter from the President of the United States to officers of the Army and Navy, directing them to assist the claimant, as opportunity offered, in getting out such cotton as he might purchase, proceeded to purchase large quantities of cotton in the States of Louisiana and Arkansas, then in insurrection against the Government of the United States, but before he could remove the same to market, the Congress of the United States, by law, prohibited the transfer

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of cotton from within the Confederate lines, and the cotton of the claimant, being found within the Confederate lines, was burned by troops of the United States; that the said McDonald, in his petition in bankruptcy, in describing the said claim among his assets, as by law he was required to do, described the same in the following words, viz.: "Claim against General Osborne, of the United States Army, and others, for burning, in January and February, 1865, from 1,000 to 2,000 bales of my cotton in Arkansas and Louisiana," and described in no other way, and in no other place, any claim against any person, officer, or government for the destruction of cotton, except that in the duplicate schedule filed in the office of the register in bankruptcy of said court, the quantity of cotton is stated at 7,000 or 8,000 bales. That complainant, on the 27th day of September, 1868, under an order of said court and as assignee, sold the uncollected accounts belonging to the estate of the said A. R. McDonald to William White for the sum of twenty dollars; and that the said Augustine R. McDonald alleges that the said claim against the United States was included in the said sale, and was purchased by the said White, who afterward assigned the claim to the said McDonald, and thus that he holds the same free from any right or claim in and to the same of this complainant.

The complainant then submitted that McDonald cannot hold such claim, because in his said schedule he has given no sufficient description of the said claim, for he describes no claim against the United States, but only a claim against certain officers of the United States, thus, by implication, denying the liability of the United States for their act; and this implication is the stronger, because in a subsequent part of the schedule he inserts "a claim against the United States for stealing 1,323 bales of my cotton in 1865," and the real claim against the United States, not being described in the schedule, was not included in the order of sale, and not sold. And, also, because in the description of a claim for the burning of his cotton, he has not stated particulars which were essential to give it any validity whatever.

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For neither the United States nor their officers were liable for the destruction of cotton found in the enemies' country, to whomsoever belonging; but the liability in this case arose solely from the encouragement and inducements held out to the claimant by the President and Treasury Department, and the violation of the promises of protection made to him by them.

And the award in this case was made upon the special facts set forth in the memorial and evidence, viz.: The claimant had from the government permission to buy the cotton, promises of protection for it, and an order from the President in person directing officers of the Army and Navy to aid the claimant in getting his cotton out of the so-called Confederacy; in fact, that thus he was induced to buy the cotton, which was afterward destroyed by United States officers, nothing of all of which appears in the schedule or otherwise in the case. The complainant further shows that the said defendant, McDonald, reported to the court his individual known debts to the amount of \$177,380, besides other amounts not ascertained; while upon the schedule of his assets, filed in the office of the registrar in bankruptcy of the said District Court, ten items of his assets, including the claims against General Osborne and the United States and officers thereof, for burning and stealing cotton, are reported "worthless"; one other claim is reported "doubtful"; and that from none of the assets has anything been realized except the twenty dollars from William White.

And complainant charges that the defendant intends and will, unless prevented by the interposition of this honorable court, collect, by himself, his agents or attorneys, the said fund, and apply the same to his own use, and thus defeat the just rights of his creditors and of complainant in the premises; and he prays that the writ of injunction be issued to restrain the defendant from collecting or receiving the amount of said claim or award, or any part thereof, until the further order of this court; and that the said defendant be decreed to have obtained the said award, subject to and in trust for the payment of his just debts, contained in his schedules filed in the District Court

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of the United States as hereinbefore stated, and subject to the rights of this complainant as assignee in bankruptcy of his estate and effects; and that the said defendant be decreed to execute such further deeds as will, under the rules governing the payment of the awards made by the said mixed commission, enable this complainant, in his character of assignee in bankruptcy, to collect the amount of the said award.

The Acts of Congress empowering the President, in certain contingencies, to declare the inhabitants of States, or parts of States, in insurrection, and to license commercial intercourse therewith, together with the rules and regulations in regard to such trade prescribed by the Secretary of the Treasury, are set forth in exhibits to the bill.

The defendants interposed a special demurrer, denying that, upon the facts alleged in the bill, this court had jurisdiction, or that any right of action to said claim passed to the assignee by virtue of the assignment in bankruptcy. Other proceedings had taken place, but by agreement of counsel the cause was heard upon the demurrer, and a decree was made sustaining it, and dismissing the bill of complaint at the cost of the plaintiff.

F. P. Stanton, J. D. McPherson and George F. Appleby, for complainant.—The demurrer goes on the following grounds: 1st. That this court has no jurisdiction, the exclusive jurisdiction being in the District Court for the Southern District of Ohio. This ground is untenable. It was decided in *Johnson, Assignee, v. Bishop* (1 Woolworth, U. S. C. C., 326), that the assignee may sue in any proper court to recover the assets of the bankrupt. 2d. That the demand against McDonald was barred by the limitation of two years, the right of action having accrued the 12th day of February, 1869. This ground is untenable. It was ruled in *Clark v. Clark* (17 How., 315), that the limitation does not run in favor of the bankrupt, but that if did, it would begin to run only from the time when the bankrupt got possession of the fund; and, as he never did so, the act did not apply. That is this case. 17 How., 321, 322; see, also, *Bailey, Assignee, v. Weir et al.*, 12 N. B. R., 24, 21 Wall., 342.

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3d. That neither at the date of his petition for the benefit of the Bankrupt Act, nor at the date of his discharge had the claimant any right of action against the United States, nor did any claim or right pass to the assignee. In *Grant v. The United States*, in the Court of Claims, that court decided that the destruction of property to prevent its falling into the hands of the enemy was a taking for public use, and entitles the owner to indemnity by the United States, and gave judgment. Congress appropriated the money to pay the judgments. The same was ruled in *Mitchell v. Harmons* (13 How., 115).

4th. That the claim against the United States, being for a tort, did not pass to the assignee. This ground is untenable. (See the authorities cited under point 1.)

5th. That, as appears by the bill of complaint and by the treaty of May 8, 1871, no grounds of action nor any right of action ever existed in favor of McDonald or his assignee against the United States. Although no right of action exists, a right to justice, dependent upon the discretion of the sovereign, is such a right or equity as passes under the Bankrupt Law. *Comegys v. Vasse*, 1 Pet., 193; *Milnor v. Metz*, 16 Pet., 227.

Charles A. Ray, for defendants: Although in a brief filed by appellees, the bankrupt acts, upon which rested the decision of *Comegys v. Vasse* (1 Pet., 193); *Milnor et al. v. Metz* (16 Pet., 221), and *Clark v. Clark et al.* (17 How., 315), were especially referred to, and the essential difference between those laws and the present Bankrupt Act pointed out, this was done without extended comment upon these authorities.

The brief reference orally made to these authorities upon the argument I propose to now present in more condensed form.

In the first case cited, the learned judge who delivered the opinion used this language (at the foot of page 217): "We may now come to the point, which, indeed, is the only one of any intrinsic difficulty in the cause, whether the right so vested in Vasse to compensation passed, under the bankruptcy assign-

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ment, to his assignees. That this is a question free of doubt will not be affirmed by any person who has thoroughly examined it or read with care the elaborate opinion of the court below. *The true solution of it must be found in a just exposition of the object, intent, and language of the statute of bankruptcy of 1800, c. 19.*"

It thus appears that this decision was rested entirely upon the peculiar language of the Act of 1800, the learned judge admitting that even under that statute the question was not free from doubt. The 14th Section of the present act, while containing no language so general and comprehensive as the Act of 1800, does contain, within the same section, words that express limitation.

The special portion of the section covering the question under consideration, supplying the ellipsis, will read thus: *And all his rights of action* for property or estate, real or personal, and *all his rights of action* for any cause of action which he had against any person arising from the unlawful taking, or detention, or injury to the property of the bankrupt." It thus appears that a cause of action only passes to the assignee when it is accompanied by a right of action; and if under the statute of 1800, it was not "*a question free of doubt*" whether the cause of action passed, it must be very clear that under the language of the present statute it does *not* pass to the assignee. The effect of the decision in *Comegys v.*

Vasse is that, unless the words used in the statute are broad enough to cover every description of vested right and interest in law and equity, and the other sections of the act "contain no language abridging the proper inferences deducible from this language," a claim of this nature would not pass. In the case of *Milnor v. Metz* (16 Pet., 221), the opinion is delivered by Catron, judge, and is rested entirely upon the case of *Comegys v. Vasse, supra*, the judge being at no trouble to inquire whether the language of the Pennsylvania insolvent act, under which the case should have been decided, was identical in the language used with the Bankrupt Law of 1800, upon which the case of *Comegys v. Vasse* was rested. The case is

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only entitled to be considered as an affirmance of the case which it follows. In the case of *Clark v. Clark et al.* (17 How., 315), it appears (p. 317) "that all the papers and evidences in support of said Mexican claim were not in his" (the bankrupt's) "possession, but had been, in the year 1842 or earlier, filed publicly before the commissioners appointed under the convention of April 11, 1839, and were afterward placed, and at the time of the commencement of the proceedings in bankruptcy, were of the public archives of the Government of the United States, and there remained until the time of said award." Ferdinand Clark took the benefit of the Bankrupt Act on the 22d of March, 1843. It thus appears that, at the time of the bankruptcy, there not only existed a right of action for a cause of action in favor of the bankrupt, but that legal proceedings had actually been brought upon the claim before commissioners having jurisdiction thereof, which proceedings were pending at the date of the assignment in bankruptcy. This decision was made under the Act of 1841, the language of which is general and comprehensive; but I have no hesitation in admitting that, under like circumstances—the right of action existing, and the proceedings actually pending at the date of the assignment before commissioners having jurisdiction of the subject-matter—the assignee would take, even under the present statute. But the very fact that none of the conditions exist in the present case which are stated by the court as controlling the decisions in the former cases, not only justifies, but requires the court to hold that this claim does not pass. When the Supreme Court assigns special reasons for making a ruling, this court cannot make the same ruling where none of the reasons exist, save in disregard of the decisions of the Supreme Court. I submit that the decisions cited not only do not conflict with the position I have assumed, but a proper respect for the reasoning of the Supreme Court, as applied to the present statute, requires its approval by this court. Beyond all this, the language and purpose of the Treaty of Washington—no claim being considered unless held, at the time of its presentation, by a subject of the nationality

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against which the tort was committed (the government alone being responsible before the commission and not the individual claimant), and the award being that the money be paid to the respective governments, and not to the subject; would seem to relieve all doubt and exclude any claim of the assignee.

WYLIE, J.—The cause was heard at the special term in equity on general demurrer of the defendants to complainant's bill. The demurrer was allowed in that court, and the bill dismissed. From that decree the cause has come here on complainant's appeal. Previously to filing the demurrer, the defendants had put in an answer, to which no replication had been filed by the complainant. Having elected to make their defense by way of answer, it was too late for the defendants to demur except by agreement of counsel. After this, other counsel having appeared for defendants, such an agreement was entered into by counsel for their respective clients and was filed in the cause. Thus the cause came on to be heard upon the demurrer to the bill, without regard to the answer or to any other proceedings which had taken place of an interlocutory character. The court was thus not at liberty to know that any answer had been filed, or that any facts connected with the case existed, except only such as appear upon the face of the bill itself, including its exhibits.

While a demurrer lies only for defects which are patent on the face of the bill, and is bad if it assert matters of fact outside of the bill, it is equally clear, on the other hand, that if the case made by the bill itself be insufficient to entitle the complainant to the relief he seeks, he cannot be allowed to fortify the case so made by invoking aid to his bill from matters of fact which do not appear upon its face. Story's Eq. Pl., Sec. 433, et seq.

These are fundamental principles of pleading by which every court is bound, and which generally they endeavor to observe. It is to be assumed, therefore, that, in deciding the issue in the present case, this court will know nothing except

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the facts properly stated in the bill itself or its exhibits. To that rule we propose, on this occasion, strictly to adhere.

The subject of controversy in the present case, is an award of one hundred and ninety-seven thousand one hundred and ninety dollars made by the commissioners under the twelfth article of the treaty of 1871 between the United States and Great Britain.

That award was not signed by the American commissioner, for reasons of which we are not informed. It is in the following words:

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We award the sum of one hundred and ninety-seven thousand one hundred and ninety dollars, to be paid in gold by the Government of the United States to the Government of Her Britannic Majesty in respect to the above claim.

L. CORTI,
RUSSEL GURNEY,
Commissioners.”

McDonald was a subject of Great Britain, who claimed, before the commission, that, in the early part of the year 1864, he obtained a permit from the Treasury Department, and a letter from the President, with which he proceeded to the States of Arkansas and Louisiana, where he purchased a large quantity of cotton, which was subsequently destroyed by troops of the United States while engaged in belligerent operations. At the time he obtained his license, as he claimed it to be, it was lawful for the President to authorize licenses to trade with the enemy in special cases, under regulations prescribed by the Secretary of the Treasury. Subsequently to the purchase of his cotton, the Act of Congress of July 2, 1864, was passed, which forbade the granting of such licenses, and revoked those which had theretofore been issued; and in February, 1865, the cotton was said to have been destroyed. McDonald claimed

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that he had made his purchases under a license from the United States in May and June, 1864; that the Act of Congress of 2d July revoked his license, in consequence of which he was unable to remove his cotton, and its destruction took place in February, 1865. And this was the foundation of his claim before the commissioners. After the claim had been allowed by the commissioners, and the money was yet in the Treasury of the United States, but ready to be paid over to the British Government, as required by the treaty, the bill in the present suit was filed, by which the complainant asked this court to compel McDonald to execute an assignment to complainant of the money so awarded to be paid to the British Government in respect of the claim, and for an injunction to restrain McDonald from receiving the money. The complainant claims that the fund belongs to him by reason of certain proceedings in bankruptcy in the southern district of Ohio, which took place in 1868 and 1869, under which McDonald was discharged as a bankrupt on his own petition, and all his property passed to the complainant as assignee, including the right to the fund here in controversy. It may be conceded that, so far as the claim in question could be affected by the laws of this country, it did pass to the assignee in bankruptcy, according to the principles affirmed in *Comegys v. Vasse* (1 Pet., 193). That was a case which arose under the treaty of 22d February, 1819, with Great Britain. The commissioners in that case had made an award in favor of the assignee in bankruptcy, and the money was paid to him. Vasse, the bankrupt, brought an action to recover this money from the assignee, on the ground that the claim had not passed under the bankrupt assignment; but the court held that it was such right or claim as could and did pass under that assignment.

Both parties were citizens of this country, and the money had actually been received by one of them. An abstract of the proceedings in McDonald's bankruptcy is attached to the bill as an exhibit. These show that, on the 17th of March, 1869, the applicant, McDonald, received his final discharge. It also shows that, on the day immediately preceding, on the applica-

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tion of the assignee, McDonald was examined under oath as to the nature and condition of his property, and that this examination was reduced to writing and filed in the proceedings. The complainant has not supplied us with a copy of this paper. Had it shown any want of truth, or contained false representations calculated to mislead his creditors as to the character and value of the claims in question, doubtless it would have been set forth. The bill itself, however, charges nothing of the kind in regard to that examination. On the 17th of March, 1869, then, the bankrupt was finally discharged, free of his old debts, and entitled to all his future acquisitions. About six months subsequent to the bankrupt's discharge, the assignee (this complainant), under authority from the court, sold the accounts, judgments, &c., late the property of the bankrupt, to William White, one of the defendants in this suit, for the sum of twenty dollars. The bill in this case does not affect to deny that McDonald's claim against the United States on account of the destruction of the cotton in question constituted a part of the subjects thus sold. But it asserts that the cotton-claim did not pass under that sale for several other reasons: First, because White, in fact, made the purchase on behalf of McDonald, and with McDonald's money; but there is nothing, we think, in that objection. McDonald had received his final discharge six months previously to the sale, and had he thought proper, or found it convenient, might have been the purchaser in his own name. The third reason set out in the bill against the validity of that sale to White is because, in his application before the commissioners under the treaty, McDonald made no mention of the fact that such a sale had taken place as by the rules of the commission it was his duty to make known in such case.

But if the sale to White was for McDonald's use, then it might well be said that no transfer had been made. The claim was still McDonald's under a fair purchase, although for a time it had belonged to his assignee in bankruptcy. But suppose the sale was made to White for his own use; how could the concealment by McDonald of that fact from the commissioners invest the assignee with any title? His title was already gone

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by the sale. The third objection to the validity of the sale made by the assignee is that, in the schedule of his assets, McDonald describes one only of his claims as being against the United States, but the other is described as being a claim "against General Osborne, of the United States Army, and others, for burning, in January and February, 1865, from one thousand to two thousand bales of my cotton in Arkansas and Louisiana." (This claim, by an amended schedule, was subsequently enlarged to seven thousand or eight thousand bales, and marked "worthless.") It is not charged in the bill that the error in stating that the claim was against General Osborne and others, and not against the United States, was committed with any design of fraud on the part of McDonald, but that it was calculated to mislead as to its value—a claim against the Government being of greater value than one of the same character against an individual, or, at any rate, that it was not a correct description. But in that matter the act of General Osborne was the act of the Government, which was responsible for his conduct, and this was known, so that it was substantially a statement that the claim was one against the Government.

Besides this, the bankrupt proceedings, which are referred to as an exhibit, show that on the very day preceding the bankrupt's discharge, he was examined under oath as to the condition of his property, when an opportunity was afforded to the assignee and creditors to obtain all the information they could desire as to the value and character of this claim, and this information was probably obtained, but the complainant has neglected to annex it as an exhibit to his bill. Another objection made to the way in which McDonald described his claim in the schedule is that it contains no reference to the license under which McDonald claimed to have purchased the cotton, and which was essential to the validity of any such claim against the Government. But this objection appears to be quite as groundless as either of the others. If it be necessary that the bankrupt should not only specify the amount and character of his claim and the party against whom it exists, as

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he did in the present instance, but also state the evidence and other muniments to sustain it, probably no schedule in proper form has ever been filed in any Bankrupt Court. The mere assertion of a claim on account of cotton destroyed by an invading force in the enemy's country amounts in itself to an implication that the claimant relied upon the protection of a Government license in its purchase, otherwise the claim would be preposterous on its face. Having, therefore, asserted a claim at all against the United States in his schedule, he asserted a claim which all men knew could be good only under a license. But in none of these respects, or any other respect, does the bill make a charge of any fraudulent purpose on the part of McDonald.

We are now brought to the point at which it is charged that the claim, as enlarged in the amended schedule, was marked by McDonald "worthless." If the claim, at the time, was, indeed, known by McDonald to be of considerable value, or if he had reason to believe that it was valuable, or acted upon such belief, then this case would have fallen within the ruling in *Clark v. Clark*, 17 How., 315. But at best the claim at that time was but a mere possibility of value. As against the United States directly, McDonald could assert no claim. He was a subject of Great Britain, and as such could claim the interposition of his government on his behalf. There was a possibility of a treaty, but in making treaties private interests are often sacrificed for political considerations. A treaty might be made some time in the future or might not. If made, the period might be remote; and, whenever made, it might contain no provision for his case. Under these circumstances, McDonald might fairly have set down his claim as "worthless." I propose now to go further, and to show from the face of this bill and its exhibits that the claim in question was utterly without foundation or value at the date of the proceedings in bankruptcy, and that White, who bought it for twenty dollars, paid more than it was worth. By the laws of war, property found in the enemy's country is liable to destruction by the invading force without regard to whether it

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belong to enemy, neutral, or friend. Its location makes it all enemy property, and if it in fact be property of a neutral, he will have no right to compensation for his loss.

Foreigners who reside in the enemy's country in time of war must share the inconveniences of its citizens. The law upon this subject was clearly stated by Mr. Marcy, when Secretary of State, in answer to a demand made by the French Government upon the United States for indemnity on account of losses sustained by French citizens from the bombardment of Greytown by a naval force of the United States, as follows: "No power assailing an enemy's country is required to discriminate between the subjects of that country and foreigners domiciled therein, nor can the latter, with any better right than the former, claim indemnity in any case except from the country under whose jurisdiction they have placed themselves." Nevertheless a license to trade with the enemy may be granted by a belligerent State to its own subjects, to neutrals, or even to subjects of the enemy, and operates as a dispensation with the laws of war so far as its terms may fairly be construed to extend, but being a high act of sovereignty, it is necessarily *stricti juris*, and must not be carried further than a clear construction of its terms will permit. See Lawrence's Wheaton, 690, 691. The leading case on this subject is that of the *Hope*, which was an American vessel, laden with corn and flour, captured while proceeding from the United States to a port in Spain occupied by British troops, under a license granted by the British consul at Boston, accompanied by a letter of approval from the admiral on the Halifax station. Sir William Scott pronounced judgment condemning the vessel as lawful prize, on the ground that neither of these officers possessed authority from the Government to grant a license to the ship to trade with the enemy. By the Act of Congress of 13th July, 1861, the President was authorized, in his discretion, to grant licenses to trade with the inhabitants of the insurrectionary States, and such intercourse, so far as by him licensed, should be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury. In

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pursuance of the authority conferred by this law, rules and regulations were issued by the Secretary of the Treasury at different times and promulgated by order of the President. Such as are appropriate to the facts of this case, as stated in the bill, will be referred to presently. All these several series of regulations are expressly made exhibits to this bill, and are, therefore, proper to be considered on this demurrer. The complainant was bound to state in his bill the authority under which McDonald proceeded to the enemy's country for purposes of trade, and to show that the license was in all respects such as the law of Congress permitted, otherwise the bill itself shows that he acted without license, and that his claim was without foundation.

The bill does state that he had a letter from the President recommending him to the protection of the officers of the army. It also states that he received a promise of protection and necessary permits from the Treasury Department. But neither the letter nor the permits are set out in the bill, or any of the exhibits, nor does it pretend to state their substance, nor even that the permit was signed by the Secretary, or signed by any one.

What constituted a necessary permit was such a permit as the law authorized, and the bill affords us no light as to the character of McDonald's permit, except the expression of an opinion on his part that it was such a permit as he needed for his purposes. Had the permit been exhibited, or its substantial contents stated in the bill, perhaps we might have differed from this complainant as to its character. At all events, we have a right to know something more on this subject than we find in this bill. The rule is that the bill should state the right, title, or claim of the complainant with accuracy and clearness. See Story's Eq. Pl., § 241. In the case of *Dainese v. Hale*, decided by the Supreme Court of the United States at the present term, Mr. Justice Strong, in pronouncing the opinion, says: "One who seeks to shelter himself from personal liability for an alleged tort on the ground that the act complained of was committed by him in the exercise of consular jurisdiction, must

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set forth the laws, usages, &c., which authorized that jurisdiction."

In the present case, the value of McDonald's claim, if any, depended upon his license. The Act of Congress alone could make the license lawful. No permit granted by any officer of the Government, the army, or navy, could relieve him or exempt his property from the liabilities of an enemy, except such as was issued strictly in pursuance of the law. By the Act of Congress of 13th July, 1861, the President was vested with discretionary authority to prescribe in what cases, and on what terms, a partial intercourse might be permitted with the States then in rebellion. In pursuance of this authority, he directed the Secretary of the Treasury to prescribe the regulations which were issued by that officer on the 4th of March, 1862. These regulations were still in force at the date when McDonald claims that he obtained a letter from the President, and a permit from the Treasury Department to go into the Southern States for the purpose of buying cotton, and were expressly made subject to future modification or revocation.

The first of these regulations declared that "All licenses shall be issued by the Secretary of the Treasury, and all applications therefor must be made in writing to him, stating specifically the purpose for which a license is desired, and if for general or special trade, setting forth the character and aggregate value of the merchandise to be transported to the destination thereof, and the proposed route of transportation; and also the character of the merchandise, if any, desired in exchange, with the proposed route of transit thereof, and its destination." The second regulation prescribes that "Before the delivery of any license, the party therein permitted to trade shall execute a bond to the United States, with sufficient sureties, in the penal sum of at least twice the amount of the trade so licensed, which bond shall be subject to such approval, and conditional on such terms as shall be specified in the license."

Along with the promulgation of these regulations the Secretary of the Treasury gave notice that they were to remain in force so long as the condition of hostilities shall continue, unless

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sooner modified or revoked. It would have been more satisfactory—it was indispensable—to show in this bill that McDonald's license was in strict conformity to these regulations. Nowhere is there to be found, however, any regulation which authorized a license to purchase cotton in the South, and bound the United States to protect such cotton from the dangers of war. But the ground of McDonald's claim against the United States was that he bought his cotton under a permit, and before he could get the cotton away under his permit, his license to trade and transport was revoked by Act of Congress of 2d July, 1864.

It is a sufficient reply to that ground of claim to say that it was a time of war, when parties who ran risks sometimes made large profits, and sometimes met with great losses.

The permit in this case, if one was ever granted, was obtained on the express condition that it might be revoked at any time. McDonald, with eyes open, chose to take his permit on that condition. In one month, or perhaps two, after the cotton was purchased, the permit was revoked by the Act of Congress of July 2d, 1864. I can see no ground for damages from that cause, and there is still another ground upon which, in my judgment, his claim against the United States was worthless. According to his statement, the cotton was bought in the months of May and June, 1864, and not destroyed till February, 1865. At the time of its destruction, it is not even alleged that he was present himself, or had any agent or servant in charge of it, or that in any respect he exercised the slightest care for its protection, or that notice was given to General Osborne, or any officer of the force by which it was destroyed, of the existence of his license, if he had one. If, indeed, the cotton was there and owned by him, it was not distinguishable from that of the enemy, and therefore subject to all the contingencies of war in a hostile country. Property so situated, and of that value, should have had the personal guardianship of its owner. If a license for its protection existed, and had been shown to General Osborne, as in that case it ought to have been, the cotton would not have been

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destroyed. No military officer can violate a safe-conduct, or lawful permit, except at his utmost peril.

But it is claimed that McDonald might have brought away the cotton, but for the passage of the Act of July 2d, 1864. We have already seen that this was one of the risks which, after full notice, he chose to assume. Besides, the bill contains no averment that he made use of any diligence to bring it away, either before or after the passage of that act, until about the time it was destroyed, when it is stated he procured a special permit for that purpose from the Government here, but that before he could act under it the cotton was destroyed. But why should he care to incur the hazards of transportation in such a time, and in his circumstances? The license from this Government, had he shown it, would have been his sure protection, and he alleges that he had also obtained a similar license from the Confederate authorities. With the exercise of the commonest discretion, his cotton was safe from danger on either side. If his story be true, the cotton was lost by his own neglect, and his claim against the United States or General Osborne was indeed, as he stated, utterly worthless. He knew this better than any one else, and marked it so in his schedule. Under these circumstances, the worthless claim was sold by the assignee in bankruptcy, and purchased by White for more than its value.

It matters nothing whether White bought the claim on account of McDonald or for himself. Six months prior to that transaction McDonald had been discharged under the bankrupt proceedings, and thereafter had a perfect right to the proceeds of his own industry and enterprise, and to make his investments in what way he pleased. Concede that the sale to White was on his account, it shows that he was not, at that time, looking forward to the treaty of 1871, under which the claim should be made valuable through the power of the British Government. The claim derived all its value from that treaty. It was one of those chances which sometimes happen to create fortune for the recipient without merit or exertion on his part. In itself the claim was without value, but the British Govern-

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ment took it up, and, by paying equivalents to the United States, procured its allowance. And now the very assignee in bankruptcy who made the sale steps forward and asserts a claim to the fund in the face of his own acts, done with the sanction of his court, and which were all valid and regular at the time, for no other reason than that the property which was worthless when he sold it, has turned out to be valuable in the hands of the purchaser, from considerations which could not have been foreseen, and which were independent of its merits. Lengthened as the opinion is already, I cannot bring it to a conclusion without adverting to another view of the case, which, on the face of this bill, demands attention. By the twelfth article of the treaty of 1871, it was provided that a commission should be chosen by the respective parties to the treaty, who should have the power to determine upon all claims which the respective governments should present on the part of their respective citizens against either of the governments of the character therein described. These claims were to be prosecuted only by counsel appointed by the respective governments, and only on evidence so furnished. There was to be no private interference. The contestation was to be between the one government and the other only. And by the fifteenth article it was provided that "all sums of money which may be awarded by the commissioners on account of any claim shall be paid by the one government to the other, as the case may be, within twelve months after the date of the final award, with interest, and without any deduction save as specified in article 16 of this treaty." By the fourteenth article, it was provided that the commissioners should be competent "to decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly, or to any and what extent, according to the true intent and meaning of the treaty." The money was to be paid over by the Government of the United States into the hands of the British Government. The object of this bill is to compel the defendants to make a written assignment or transfer to the complainant of the claim so held by McDonald against the

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British Government, under the award of the commissioners in his case. There are, at least, two insuperable obstacles arising out of the treaty which, in our judgment, forbid our exercise of jurisdiction in this matter. The first arises from the express language of the thirteenth article, which declares that "the high contracting parties hereby engage to consider the decision of the commissioners as absolutely final and conclusive upon each claim decided upon by them, *and to give full effect to such decision*, without any objection, evasion, or delay whatsoever."

Concede the right of this complainant to the fund in controversy, the fund is in the hands of the British Government for *its* administration, placed there in trust, to be disposed of under its contract "*to give full effect to such decisions.*"

The British Government is the tribunal created by the treaty itself to dispose of the money. With the manner of performing that duty neither this government nor any of its courts can interfere.

The treaty determines that question. The money is in England, and in the hands of that government, to be disposed of with no accountability to any other government or authority whatever. To exercise jurisdiction in such a case by this court would be vain and nugatory. The British Government might respect our decision, but that would be just as it pleased. Were we to decree here that the money was the property of this complainant, and that McDonald should execute to him an assignment thereof; our decision would be simply nugatory. In Story's Equity Pleadings, Section 489, the author says: "In general, the fact that the property is not within the jurisdiction constitutes no bar to a proceeding in a court of equity, if the person is within the jurisdiction; for a court of equity acts upon the person, or, to use the appropriate phrase, *æquites agit in personam*. But questions may arise under a bill respecting funds or other things in a foreign country so purely local that a court of equity in another country might very properly decline to interfere and remit it to the domestic forum." It is quite true that suits in equity were entertained

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in this Court to determine the right to rewards made by the commission which sat here under the treaty of Guadalupe-Hidalgo, but that was where the fund was within the jurisdiction of the Court, and a statute had expressly provided that such suits might be brought to determine rights as between citizens of the United States. It was also decided in *Comegys v. Vasse*, 1 Pet., 193, that the commissioners under the treaty with Spain of 22d February, 1819, had power to decide upon the amount and validity of claims, but not upon the conflicting rights of parties to the sums awarded by them, which belonged to the courts.

But in that case the controversy was between two citizens of the United States, and the fund was here, to be administered by this government and paid to its own citizens. Suppose in that case that *Comegys*, the assignee in bankruptcy, in whose favor the award was, had happened to be in Spain, and some citizen of Spain had there brought a suit against him, claiming the proceeds of the award, would any one contend that such a proceeding could have been maintained in that country, or, if so, would have been respected in this. It would have been a sufficient answer to reply that by the terms of the treaty the awards made were to be for claims of American citizens against Spain, and that the American Government had undertaken to pay these awards through its own tribunals, executive or judicial. And yet that would have been a less objectionable proceeding than this one; for the terms of the Spanish treaty conferring jurisdiction over the subject on the American Government are not nearly so comprehensive and emphatic as those contained in the treaty of 1871, conferring jurisdiction upon the British Government in respect of the awards in favor of its subjects.

These remarks are equally applicable to the case of *Freval v. Bach* (14 Pet., 95), which was a controversy between American citizens as to the division of a sum of money received by the United States from the government of France under the treaty of July 4, 1831. Had some French citizen claimed a right to this fund and sought to enforce his claims by a decree

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obtained in a French court, *in personam*, against an American who happened to be found in that country, it would have been a case like the present.

I cannot imagine that such a decree would have been respected by the government of this country, to which the money had been paid with authority under the treaty to dispose of it among American claimants. The fund in controversy in the present case is in England for all the purposes of this case, and, since its payment, has never been within the United States. From this proposition another question arises which has not yet been considered; and that is, whether the title to this fund could have passed to this assignee under the assignment in McDonald's bankruptcy.

In England, the doctrine is that bankrupt assignment transfers all the bankrupt's personal property, wherever situated; but such is not the law as held by the courts of this country. In *Oakey v. Bennet*, 11 How., 33, it was held by the Supreme Court of the United States that a decree in bankruptcy, passed in 1843 by the District Court of the United States for the eastern district of Louisiana, did not pass to the assignee real property in Texas, which at that time was a foreign country. In that case the Court says (McLean, J.):

"A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principles of comity; and national comity does not require any government to give effect to such assignment when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding *in rem* against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment."

The same views are to be found in Lawrence's *Wheaton*, 2d ed., p. 162, where it is said that, "All the effect which foreign laws can have in the territory of a State depends absolutely on the express or tacit consent of that State. A State is not obliged to allow the application of foreign laws within its ter-

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ritory, but may absolutely refuse to give any effect to them." And at page 163, the author quotes the following maxim from Huberus: "By the comity of nations, whatever laws are carried into execution within the limits of any State are considered as having the same effect everywhere, *so far as they do not occasion a prejudice to the rights of other States and their citizens.*"

Our bankrupt law, therefore, and any proceedings under it, can propose no extra territorial operation, except as permitted by the laws of other countries. Of itself, the assignment in bankruptcy transfers no title whatever even as to personal property whose *situs* is beyond the United States. Foreign judicial tribunals, however, on the principle of comity, will give effect to such assignment whenever such action would not interfere with the rights of their own governments or subjects. In the case before us now, by the express terms of the treaty, the exclusive administration of the fund has been committed to the British Government. A claim of jurisdiction on our part would be directly in conflict with that conferred by the treaty; the ground of comity is swept away; the money is beyond our reach; and this bankrupt assignment would be a nullity in England, because it is in conflict with the treaty, which is the law of that country, as it is of this. It was on a similar principle that the Lord Chancellor in *ex parte* Blake, 1 Cox, 393, refused the petition of an assignee in bankruptcy to execute an assignment to him of claims due to the bankrupt in America. In that case the Lord Chancellor said: "My difficulty in making such an order as is now prayed against the bankrupt is this, namely, that if he refuses I must commit him, and yet, in contemplation of our laws, the very instrument he is required to execute is of no effect." In Wharton's Conflict of Laws, section 843, the law is thus stated: "That notwithstanding the attachment (by which is meant the assignment in bankruptcy), the bankrupt still retains his capacity to dispose of his property in foreign lands. This capacity remains to him as to such property until divested by the *judex rei sitæ*. This point is abundantly settled by decisions both in Germany and France, as

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well as in the United States. But the domestic assignee, as the representative of the creditors in general, as well as foreign creditors specially, may apply according to the modern Roman law, in foreign countries, where the estate has assets, for an attachment of such assets. In the practice of the United States courts, a foreign bankrupt assignee has, as such, no standing in the courts, though, if there be no conflict with his assignor, or with creditors, he may be recognized as the representative of the assignor," citing *Perry v. Barry* (1 Cr. C. C., 204); *Blane v. Drummond* (1 Brock., 62); *Hunt v. Jackson* (5 Blatchf., C. C., 349). A jurisdiction which depends on the comity of another nation cannot be jurisdiction, except in that country of which the comity is asked. One other point still remains, and will be considered as briefly as possible. The only relief asked for in this bill, except injunction (and that question is not now to be looked at), is that these defendants be required and enjoined to assign and transfer all their right to the fund to this complainant as assignee in bankruptcy.

On the complainant's own showing, why should that be decreed? He says it belongs to him under McDonald's bankrupt assignment. If that be true, he needs no other assignment; he may assert his rights quite as well without the relief he asks as with it. Either way he must apply to the British Government or the British courts. An assignment made under an order of this Court would be an assignment *in invitum*, not a voluntary sale.

It would have no effect, therefore, except such as it might derive under the doctrine of international comity. That much, and even more, this complainant already has under the assignment in bankruptcy.

The English courts, it is well known, have gone further with the doctrine of comity in favor of bankrupt proceedings of other countries than any other class of foreign judgments or decrees. But suppose we were to decree according to the prayer of this bill, and the defendant should refuse to obey our decree, we should then find ourselves in the position alluded to by the Lord Chancellor in *Blake's case*. We must commit

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him, and yet, in contemplation of our law, the very instrument he is required to execute is of no effect in itself, and might involve this Government in another controversy with Great Britain over the treaty of 1871.

These doctrines, we think, are entirely consistent with the doctrine of *Penn v. Lord Baltimore* (1 Ves., 444); *Massie v. Watts* (6 Cr., 148), and other cases of the same purport, in which the courts have held that in case of fraud, of trust, or of contract, the jurisdiction of a Court of Chancery is sustainable wherever the person be found, although property not within the jurisdiction of that Court may be affected by the decree. For in the present case no fraud is charged in the bill, there is no trust, and there is no contract. The whole controversy is between two distinct claims of title to the property.

In *Penn v. Lord Baltimore*, the Chancellor said: "This Court, therefore, has no original jurisdiction on the direct question of the original right of boundaries;" and Chief Justice Marshall, in *Massie v. Watts*, adds, after quoting this opinion of the Lord Chancellor: "The reason why it had no original jurisdiction on this direct question was that the decision on the extent of those grants, including dominion and political power as well as property, was exclusively reserved to the King in council." And in another place the Chief Justice says: "The inquiry, therefore, will be whether this be an unmingled question of title, or a case of fraud, trust, or contract." It is but justice to the learned counsel by whom this case was argued to say that our decision in this cause has been placed upon grounds which seemed most satisfactory to our minds, and that in doing so we do not wish to be understood as expressing an opinion one way or the other on those other numerous questions which were discussed on that occasion and not now passed upon, for the reason which has just been stated.

CARTER, Ch. J. and OLIN, J., dissenting.

In re Peabody.

UNITED STATES DISTRICT COURT—COLORADO.

A register has no authority to set off exempt property to the bankrupt, nor to direct the assignee in the matter.

An *ex parte* order approving the schedule of property set aside to the bankrupt, or confirming a report of sale of assets, made on the day such schedule or report is filed, is irregular and therefore not binding upon the creditors.

The Bankrupt Court has power to set aside such orders at any time during the pendency of the proceedings, where an aggrieved party moves therefor within a reasonable time after notice.

Creditors are not bound to except to the schedule of exempt property within twenty days after it is filed, where the assignee has failed to file it within twenty days after the assignment.

Under the statute of Colorado a merchant is not entitled to an exemption of two hundred dollars worth of goods as "stock in trade;" he is entitled to a horse, as a "working animal," but not to a buggy.

On an application by the assignee for his discharge, any misconduct on his part in respect to the estate is a proper subject for examination.

Every fact which is relied on to establish fraud should be distinctly stated and verified; and the creditor raising the issue should give security for costs.

Where property taken by the assignee is charged with a lien, the reasonable cost of keeping and disposing of it, including the assignee's fees, should be charged upon it. No charge can be allowed for the services of an auctioneer unless it be shown that such services were necessary; nor can such fund be charged with attorney's fees for services rendered to the assignee in his contest with the lienor respecting such property.

In re DAVID G. PEABODY.

Blake & Jacobson, attorneys for assignee.

Thos. Macon, attorney for Russell.

HALLETT, J.—In December last the assignee filed a report of sales made by him of goods belonging to the estate, and of certain property set off to the bankrupt as exempt, which report was on the same day approved by the judge then presiding in this court. Edward Russell, a creditor who obtained a lien upon all of the goods so sold, and some of the goods so set off, by judgment and execution against the bankrupt before the petition in bankruptcy was filed, now complains of this order of the court as having been irregularly entered, and moves to set it aside. He also objects upon several grounds to the report of the assignee, but these objections cannot be considered while the order approving the report is allowed to stand. To

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explain the force and effect of this order, it will be necessary to state some of the facts presented in the record. The petition in bankruptcy was filed in the District Court of the third district of the late territory, April 28, 1876, and the assignee was chosen and appointed on the 20th of May thereafter. On the same 20th of May, 1876, the register of that district made out and signed a paper in the form No. 20, adopted by the Supreme Court, which was doubtless intended to be a schedule of the property set aside to the bankrupt under the exemption laws. Upon examination, however, it will be found to have but few of the requisites of such a schedule. In the first place it was made by the register, the act (Sec. 5045) and the general order (19), requiring that it shall be made by the assignee. It is true that the form No. 20 has the words "district judge (or register)" at the foot, apparently indicating that it is to be signed by one of those officers. But this is obviously a mistake of the draughtsman, for the act of setting apart exempt property cannot be performed by either the judge or register consistently with the provisions of the law. The property is in the possession of the assignee, and he only can deliver it. The act imposes upon him the duty of selecting the articles to be set apart to the bankrupt, and provides for reviewing his decision. The general order requires him to report to the court the articles set apart by him, with the value of each, within twenty days after receiving the deed of assignment, and provides that creditors may except to his report. Usually and properly this report is made to the register, who also hears the exceptions of creditors, and his decision, if unsatisfactory to either of the parties, is reviewed by the court. All this is utterly inconsistent with the notion that the register may set off the property to the bankrupt in the first instance; a notion which has no other foundation than the mistake made in appending unnecessary words to the form.

If it is claimed that this paper is a direction from the register to the assignee as to the property to be set off to the bankrupt, the reply is that the register had no authority to give such direction. His duty is confined to receiving and filing the

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schedule after it has been made by the assignee, and passing upon the exceptions, if any are made by creditors.

The matter of designating the property which is exempt from the operation of the act is entrusted to the assignee, and his discretion cannot be controlled or supported by a direction from any source previously given.

But if the schedule had been made by the assignee, it does not appear to have been reported to the court, as required by the general order. It was not filed with the register; nor with the clerk until December 22d, 1876, when it was approved by the court. It seems to have been kept by the assignee, for it is attached to his report made in December, which contains all his doings up to that time. But wherever it may have been it was not in the proper place, and creditors had no opportunity to except to it before it was approved by the court. If a proper schedule had been filed with the register within twenty days after the assignment, as required by General Order 19, and no exceptions thereto had been filed within twenty days thereafter, probably all creditors would be precluded from objecting at this time. For the protection of an assignee who has performed his duty fairly, creditors ought to bring forward their objections to the schedule, if they have any, at an early day, as the rule requires. But if an assignee withholds his report until long after the time specified in the rule has expired, he cannot, by an order obtained *ex parte*, shut off inquiry as to the regularity of his proceedings. These objections to the schedule appear to be substantial, and to demand the revocation of the order made by my predecessor.

Another objection to the schedule, prepared by the register, is found in the fact that there is no sufficient description of the articles set off, nor is the value of each given. This was corrected to some extent, but not fully, in a distinct schedule filed with the other in December. The goods set off as stock in trade, and the value of them, is well enough stated in that schedule, but the value of the other goods is stated in the aggregate, and the household furniture, books, and some other things are not in any way described. But this defect may not

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be a ground for vacating the order, and it is not material to our present inquiry.

In so far as the order of December 22d relates to the sale of the estate, the right of a creditor to be heard rests upon the same consideration. No one who is interested in the estate can be cut off from being heard by an *ex parte* order entered upon the application of the assignee. Justice is not administered in that way. When the matter to be passed upon has been submitted to a general meeting of creditors, and, if it has not been so submitted, if due notice has been given, an order may be given which will settle the rights of all parties, but without notice nothing can be done which will arrest investigation into the conduct of the assignee. It is true that a creditor is a party to a bankruptcy proceeding, and, as such, bound by all that is regularly done in the course of the proceedings. But confirmation of the acts of an assignee, without notice to the creditors of the estate, and without giving them an opportunity to be heard, is not regular or proper, and therefore they are not bound by it.

The power of the court to grant the relief asked was briefly discussed and perhaps seriously denied at the hearing, but there is little room for doubt on the point. Upon contested questions regularly decided, it may be that authority ends with the judgment which is given. But as to judgments by default, and all *ex parte* orders, the rule is otherwise. *Harris v. Hardeman* (14 How., 334). In bankruptcy proceedings there are no terms of court by which authority to correct what has been done amiss can be said to be limited, and probably the court has full control for that purpose over the whole proceeding from the beginning until the end is reached.

Whether the motion to vacate the order was made in apt time is more doubtful. There is nothing of record to show when Russell was first advised of the order, unless indeed he was bound to take notice of the schedule within twenty days after it was filed. This would have brought knowledge of the facts to him early in January, and the motion was not filed until July. Such delay would be inexcusable in a case where

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the situation of the parties may change, and the assignee may suffer by the delay. But this is not the rule; for the assignee must file his schedule of exempt property within twenty days after the assignment to him, and if he does not do so the creditors may fairly suppose that no exemption has been claimed or made. It is only by diligence in putting in the schedule that the assignee can require the creditor to be diligent in bringing forward his objections to it. Under all the circumstances I am of the opinion that the order of December 22d ought to be set aside, and the report of the assignee of the property exempt from the operation of the act and of the sales made by him, as well as his disbursements, ought to be open to examination.

As affecting the extent of inquiry, it may be well to remark that a composition of the debts of the bankrupt has been had, under which it is understood that all of the debts have been paid excepting that of Russell, who is contesting these questions with the assignee. A portion only of the property set off to the bankrupt as exempt from the operation of the act was subjected to the levy of Russell's execution, and I suppose the discussion is to be confined to that portion. Something was said at the bar about the lien of the execution in the hands of the sheriff extending to all of the personal property, whether levied or not, but the question of lien as lately decided in this court and the Circuit Court, contained no feature of that kind. The demand was for payment from the fund obtained from the goods actually taken in execution, and the creditor cannot now enlarge his claim.

Referring to what was said respecting the schedule of exemptions made by the register, it may be proper to add that the report of the assignee, filed December 22d, contains a list of the property set off to the bankrupt, which will be referred to hereafter.

In that list certain goods are described as "stock in trade," which were set off under the sixth subdivision of Section 33 of the statute of the State: R. S., 380. That clause, with others, describes property which shall be exempt from execution, and reads as follows:

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"The tools and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value."

Its meaning and effect has been considered by courts of other States, and is no longer doubtful. (*Grimes v. Bryne*, 2 Minn., 89; *Guptil v. McFee*, 9 Kan., 30; *Bevitt v. Crandall*, 19 Wis., 581.)

It is applicable to miners and handicraftsmen, as distinguished from merchants and traders; and the bankrupt, as a merchant, was not entitled to its protection.

By the eighth subdivision of the statute before referred to, working animals of the value of two hundred dollars may be reserved by the debtor, and, under this clause, a horse was allowed to the bankrupt. It is contended that, being a merchant, the bankrupt could have no use for such an animal, but this is not apparent. The reservation was made by him as the head of a family, and his right to claim the property in that way is not denied. There are many ways in which a horse may be useful in supporting a family, whatever the occupation of the head of the family may be, and I cannot assume that this animal was not used for that purpose. If kept for pleasure, merely, he was not exempt (*Burgess v. Everett*, 9 O. S., 425), but of this there is no evidence. Perhaps the description in the schedule is imperfect in not describing the animal as a work horse, and in not giving his value, but no complaint has been made on that ground.

The buggy mentioned in the list is clearly not within the statute which specifies a farm wagon, cart, or dray. In some States it is held that the word wagon is used generically to signify every kind of vehicle with wheels, but to use the term farm wagon in the same sense would be very absurd. No other property mentioned in the schedule was taken in execution by Russell, and the inquiry on this point results in excluding from the list the "stock in trade" and buggy, which must be charged to the assignee.

As to the right of the creditor to call for an investigation

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into the conduct of the assignee in selling the property, no doubt is entertained. The latter has applied to be discharged from his trust, and the court is required to audit and pass his accounts: Sec. 5096. Any misconduct on his part in respect to the estate upon which Russell had, or now has a lien, is a proper subject for examination. But the charge of fraud is too vague and general to arrest attention. If the goods were sold for a nominal sum as stated, the value should be stated also, in order that the loss to the estate may be seen, and any agreement between the purchasers and the assignee respecting such sale should also be shown. So also, if goods were bid in for the benefit of the bankrupt and paid for out of the estate, the amounts so paid out should be stated. Every fact which is relied on to establish fraud should be distinctly stated in a way that may be controverted, and the whole should be verified by some one having knowledge of the circumstances. It is not intended that the person verifying shall testify to every fact as of his own knowledge, but that he shall exhibit such knowledge of the facts and circumstances as may afford reasonable ground to believe that the charge is made in good faith. The creditor should also give security for the costs which may be adjudged against him upon the hearing or trial of the issue. The practice in respect to an issue of this kind has not before been considered in this district, and the creditor will have leave to conform to the suggestions here made.

Objection is also made to charges for services and expenses which were mostly incurred in respect to the property on which the execution was levied. It seems that soon after the sheriff took possession of the property he was dispossessed by the marshal under process from the Bankruptcy Court, and thereafter the property was kept and sold by the assignee.

We have recently ascertained that the creditor, by his execution and levy, secured a valid lien upon the goods, but that point was at first involved in great doubts. Conceding *that*, the jurisdiction of the Bankruptcy Court extending to the ascertainment and liquidation of the lien was clear and undeniable. In that view no reason is perceived for exempting the

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property from the reasonable cost of keeping and disposing of it, including the services of the assignee. Such as the rent of the building in which the goods were kept, the marshal's fees and expenses in taking charge of the goods and the like. As some of the charges may be excessive, and others unwarranted, the matter will be referred to the register to report what are properly chargeable to the goods claimed by Russell. No charge can be allowed for the services of an auctioneer, without showing that such services were necessary, and then only for a reasonable sum. The time for which the assignee was necessarily employed in caring for or disposing of the goods may be entered at a reasonable rate, which will be allowed by the court and submitted to the circuit judge for approval, pursuant to the amended general order of March last.

The charge for attorney's fees stands in a different light. That charge is based upon services rendered to the assignee in his contest with Russell for the property which has been awarded to the latter. I do not find any principle upon which a litigant can be made to furnish sinews of war to his adversary, unless in case of husband and wife, where it is presumed that the wife may have contributed to the husband's property. Aside from this the assignee was contending for the property in behalf of the general estate, which must therefore be responsible for the expenses so incurred. It would be strange indeed if the general estate could cast upon this special fund the expenses of the litigation in the same manner as if it had been successful in the contest. Surely it is enough for the creditor to pay his own attorneys.

If an issue is raised respecting the conduct of the assignee in selling the property the cause may remain until that issue shall be determined. If no such issue is to be presented it may be referred to the register to examine the assignee's report and ascertain the value of property improperly set off to the bankrupt, and make the proper allowances for fees, disbursements, and services.

In re Sims.

UNITED STATES DISTRICT COURT—MICHIGAN.

An assignee may petition *summarily* to set aside a mortgage given after the commencement of proceedings in bankruptcy. Resort to a bill in equity is unnecessary.

In re STEPHEN SIMS.

ON petition of assignee to set aside mortgage.

A creditor's petition was filed against Sims July 11th, 1876. On July 20th he gave a mortgage to Atkinson & Atkinson, to secure their pay for services to be rendered by them in resisting the creditor's petition. He was duly adjudicated a bankrupt October 23d.

Messrs. Burt & Burritt, for assignee.

Messrs. Atkinson, in person.

BROWN, J.—Respondents defended solely upon the ground that this Court has no jurisdiction to proceed, summarily, to set aside the mortgage, and claim that the assignee must be driven to a bill in equity. In support of this position, the case of *Smith v. Mason* (6 N. B. R., 1, 14 Wall, 419); *Marshall v. Knox* (8 N. B. R., 97, 16 Wall, 551); and *In re Marter* (12 N. B. R., 185), decided by this court, are relied upon. I am clearly of the opinion that these cases have no application to a proceeding like the one under consideration, where it is sought to set aside a mortgage given by the bankrupt after proceedings in bankruptcy have been commenced. The rule, in the opinions above cited, has been confined to cases where the adverse party claims an absolute title and dominion over the property of the bankrupt acquired by him prior to the proceedings in bankruptcy. The title of the assignee relates back to the commencement of those proceedings, and a mortgage upon the estate taken after that, is virtually an incumbrance upon the property of the assignee. While the taking of such mortgage is not unlawful, and the same would consti-

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tute a valid incumbrance upon the property, if the petition were dismissed, of course the mortgagee must assume the risk of being required to release it, if the petition is sustained. Where the property affected by the lien is confessedly the property of the bankrupt, and has passed to the assignee, and it only remains to ascertain and liquidate the alleged lien, the summary jurisdiction of this court is entirely adequate. (*Samson v. Clarke*, 6 N. B. R., 403; *In re Ulrich*, 8 N. B. R., 15; *In re Major*, 14 N. B. R., 71.)

An order will be entered requiring the mortgagees to release the mortgage.

SUPREME COURT—DISTRICT OF COLUMBIA.

SEPTEMBER, 1875.

A discharge obtained by fraud will be vacated.

A decree annulling a discharge cannot be set aside except upon due notice to the parties to be affected thereby.

In re MORITZ AUGENSTEIN.

MORITZ AUGENSTEIN filed his petition as a voluntary bankrupt on the 5th day of September, 1872. He was subsequently adjudged a bankrupt, an assignee appointed, and on the 26th day of November he received his discharge. In May, 1874, Philip Montegriffo, a judgment creditor of the bankrupt, filed a petition to set aside the discharge as having been obtained by fraud on the part of Augenstein, the grounds of fraud being fully set forth in the petition. The bankrupt filed an answer, denying generally all fraud in relation to his property, and to this there was a replication. On the 19th day of October, 1874, it was ordered by the court that the issues raised by the petition of Montegriffo should be referred to the register, to take such testimony therein as either party should produce.

A summary of the evidence is as follows: Theresa Augen-

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stein testified that she is the wife of the bankrupt; that he owed her from two thousand five hundred to three thousand dollars in borrowed money; cannot tell how long he had owed it, or at what time and in what amounts he had borrowed it. Being asked where she got the money from, she refused to answer.

This question was certified by the register into court, and on the 10th of December, 1874, it was ruled by Justice Humphreys that the witness should not answer said question.

It was further ruled that the bankrupt, who had also been summoned by the petitioner, should not be required to answer any question tending to prove his own fraud or criminality.

George Steurnagel testified that, in 1872, Augenstein offered some of these instruments (saccharometers) for from forty to sixty dollars each. Witness understood that they belonged to Augenstein; he offered to sell them to witness on two occasions.

W. W. Kirby testified that, in June, 1872, Augenstein had certain instruments called saccharometers at his store in Washington City. Witness went to the store and saw them himself; there were a great many of them. Augenstein said they were his, and wanted to sell witness some of them; he said he had sold some of them to the government. He talked to me as if they were absolutely his own property.

Anna Montegriffo testified that she is the wife of petitioner; that petitioner has resided in Cincinnati from 1866 to date. Witness acted as her husband's agent in bringing the attachment suit against these saccharometers; she learned that Augenstein had a contract with the government to furnish saccharometers, and came on to Washington in 1872 to collect the judgment against him. Witness discovered from officials in the Treasury Department that Augenstein had been paid about seven thousand dollars, two or three days before her arrival. She then attached the saccharometers in question.

Augenstein said to witness at that time: "These machines are mine, but I will fix it so that you will not get anything of them." Witness did not, nor did her husband, to her know-

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ledge, receive any notice of said bankruptcy proceedings until June or July, 1874.

Witness has known Theresa Augenstein since 1865; she (Theresa) has been poor ever since witness has known her; she never had any money except what her husband gave her. At one time, when she was sick, she borrowed fifty dollars from witness's brother-in-law to pay rent, and has never repaid it. Moritz Augenstein's name is engraved on each of those saccharometers. Philip Montegriffo, the petitioner, testified that he resides in Cincinnati, where he has constantly lived since 1865. Never received any notice from Augenstein about bankruptcy; knew nothing of it until about a year ago, when witness's brother wrote him in regard to it. On cross-examination, witness said that he had never been in New York since 1865; that his wife, during the period from 1865 to date, has resided part of the time in Cincinnati and part in Newark, according to witness's knowledge. The petitioner also introduced a certified copy of Treasury Draft No. 3468, for seven thousand five hundred dollars payable to the order of Moritz Augenstein, and paid to him on the 8th day of July, 1872. Also a private act of Congress, approved June 8, 1872, appropriating seven thousand five hundred dollars to the relief of Moritz Augenstein. Also a certified copy of an assignment by Augenstein of letters-patent for said saccharometers to himself and three others, each being assignee of one-fourth interest therein. The bankrupt offered no evidence, and the cause was set for hearing, by order of the court, for the 18th day of May, 1875. The cause was heard at length on said day, and was argued by counsel for petitioner and respondent. Whereupon Mr. Justice Humphreys passed a decree, finding that the said discharge was fraudulently obtained, annulling the same, and referring the cause to the register, "with instructions to proceed therein according to the provisions of the Bankrupt Act."

The register proceeded, under this decree, to take testimony, offered by the bankrupt, upon the issues which had been passed upon by the decree setting aside the discharge.

This was excepted to by the counsel for Montegriffo,

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and the objection was certified to the court, and without any additional evidence than that already mentioned, and without notice to such counsel, the court passed an order vacating and setting aside the order of May 18, 1875, which annulled the discharge, and which, in effect, reinstated said discharge in full force. The cause is now here on appeal from this order.

R. Ross Perry, for petitioner, contended :

1st. That the matters alleged as facts in the petition, and relied on as grounds for the annulling of the discharge, have been satisfactorily established by the evidence adduced by the petitioners.

2d. That these facts so established are such as invalidate and annul said discharge, according to the letter and intent of the Bankrupt Law.

Chester, for bankrupt.

MACARTHUR, J.—Upon reviewing the testimony in this case, the court are entirely satisfied with the decree annulling the bankrupt's discharge. The fraud of the bankrupt in relation to his property is too clear for doubt or discussion. He is shown to have possessed considerable property, of which he gives no rational account; no assets came to the hands of the assignee; and his wife, when interrogated as to how she came to have a large sum of money, refused to give any explanation. The traces of fraud are apparent upon the slightest examination of the evidence, and little or nothing need be said upon the subject. Aside, however, from the order annulling the discharge being unexceptionable, there is no ground shown for setting it aside. An objection to taking certain testimony had been certified to the court by the register for decision. That was the matter before the court. There had been no application for a rehearing or to set the decree aside for any cause. It was, therefore, irregular to vacate it. That decree had been made upon pleadings and proofs, and the case had been argued and determined. We know of no practice that would justify the court in setting

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aside a decree passed in this way without a showing of some kind, and upon due notice to the parties affected thereby. The order vacating the decree annulling the discharge must be reversed.

HUMPHREYS, J.—I think there should be a change in both orders and decrees. The decree setting aside the discharge was too harsh and severe, and was not authorized by the state of the proofs. The decree re-establishing the certificate of discharge may have been too hastily signed; surely the decree annulling the discharge was. There had been a discharge after the ordinary proceedings in bankruptcy. This was a decree binding upon the world until set aside for some of the causes pointed out by the Bankrupt Act. The cause alleged was fraud. It is a serious consideration whether any cause which might have been urged against an original discharge can be set up to annul one which has been granted. I do not think these questions were fully considered by the justice who passed upon the decrees which are now the subject of review. The present appellate decree, reversing the last unqualifiedly, of course sets up the former, and precludes any further investigation. The only thing gained by the creditor is, that in a suit at law or equity against the debtor, the creditor is not estopped by the planning and production of the certificate of discharge. This action here leaves no estate to be administered in bankruptcy. Nothing is settled in favor of the creditor save a naked claim against a bankrupt creditor without any assets. This decree does not establish the right of an assignee to the property in dispute; it only confirms the decree annulling the discharge, and leaves creditor and debtor to contend at law, and the creditor to seek claimant also at law. The proper course would be to modify the two decrees, by reversing and holding for naught the last and suspending the decree annulling the discharge, and also suspending the certificate of discharge until the question was determined between the assignee and the claimant. The Bankrupt Act proceeds upon the theory, and expressly provides, that the debtor must settle fairly, though he pays nothing. The

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act has no sympathy with any manner of action except fair dealing; neither has the common law. A decree of discharge is of as much force as any other judgment, and is made by the act an absolute bar to any suit, except such causes as are specified in the act, and the same court that granted it can alone set it aside, and that on specified grounds. The alleged creditor in this suit had his suit at law against the property of the debtor, which suit is undetermined. This decree is premature, or rather, the decree which the determination here sets up and establishes is premature. The creditor cannot go into both courts. If he had a judgment, he could rest upon that. The property in dispute must go to the assignee or to the creditor by virtue of a lien. The withholding the property levied upon by the attachment from the schedule of the debtor is one of the alleged causes of setting aside the discharge. In this case the debtor alleges that the supposed creditor is a fraud; that he has no claim against him which he of right can prosecute; that the subject-matter of the alleged claim is still in controversy in the courts of the State of New York. There are no witnesses to the fact of notice or no notice, as far as that question can enter into this controversy, except the alleged creditor and debtor. Where the oath of the plaintiff or actor, and the defendant, or the respondent, are opposed, and the circumstances growing out of the evidence leave the matter in equipoise, the respondent's statement is to prevail. But the fact of the notice can have no effect, unless it could be shown that there was a fraudulent omission by the debtor. The *gravamen* of the charge in this case is the withholding of the saccharometers from assignee. There is a claimant to these. A suit of replevin is now pending. The issue has not been tried. If the claimant should get a verdict, then that verdict would establish, in law, that no fraud was committed, except that a debtor might be precluded from obtaining a discharge upon grounds which would not reach a *bona fide* purchaser.

The two decrees of the justice holding the United States district branch of this court are therefore premature. There should be a reversal of the third decree, and a modification of

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the second; that is, the decree absolutely setting aside and annulling the decree of discharge; for we have not as yet properly arrived at the stage to determine that question.

Section 21 of the Bankrupt Act, and the amendments thereto of 1864, might throw some light upon this case. We have, in the action taken in this branch of the court, gone ahead of and beyond the acts regulating the questions arising under the bankrupt proceedings. Creditor and debtor are both left by this determination to grope on in the road that leads to no definite point. This determination ascertains nothing which can benefit the alleged creditor or debtor, and without some specific directions the court below would be at a loss how to proceed.

UNITED STATES DISTRICT COURT—NEVADA.

A joint creditor, in case of the separate bankruptcy of one member of the firm, has a right to prove his joint debt, and vote for assignee in the separate bankruptcy.

In re WATSON T. WEBB

Whitman & Wood, for petitioner.

James Hood, in person, opposed.

HILLYER, J.—Webb, at the time he was adjudged a bankrupt, was a member of the firm of Webb & Mullard.

At the first meeting of his creditors the register permitted both joint creditors of Webb & Mullard and separate creditors of Webb to prove their debts and vote for assignee.

But two votes were cast for assignee—one, by a joint creditor, for James Hood, and one, by a separate creditor, for A. H. Ricketts. The register declared a failure to elect, and, there being no opposition, appointed James Hood to be assignee.

Exception was taken to the action of the register in allowing the joint creditors to prove and vote, and the point has been

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certified for decision. There is also an application on behalf of Ricketts for an order removing Hood and appointing him as assignee.

The register certifies that the only assets surrendered are joint assets. Whether a joint creditor may prove his joint debt and vote for assignee in case of the separate bankruptcy of one member of the firm, is the question to be decided. Under our present Bankrupt Law many important consequences result from the proof of debt or the having a provable debt. By Section 5034 the choice of assignee is to be made by the "greater part in value and in number of the creditors who have proved their debts." If it can be shown, then, that the joint creditors have a right to prove their debts, it would seem to follow that they have a right to vote for assignee. While there are conflicting decisions as to the effect of such proof, so far as my search has gone all agree that the joint creditors may prove their debts in the separate bankruptcy under Section 5067. That section allows "all debts due and payable from the bankrupt" to be "proved against the estate of the bankrupt." Section 6 of the Bankrupt Act of 1800 (2 Stat., 23) allowed the "creditors" of the bankrupt to prove their debts, and under this general designation of "creditors" it was the opinion of the Supreme Court that a joint creditor might prove his debt in the separate bankruptcy. (*Tucker v. Oxley*, 5 Cranch, 34.) Speaking of the joint debt in that case, Marshal, Chief-Justice, says: "Although due from the company, yet it is also due from each member of the company." It was also held that a proviso similar to our present Section 5118, that "the discharge should not affect any person liable as partner with the bankrupt," while the act did provide for a discharge from all debts which were, or might have been, proved, removed all doubt as to the right of a joint creditor to prove against the estate of one partner in bankruptcy.

I should be content to rest my decision upon the language of the present Bankrupt Law and the authority of *Tucker v. Oxley*, but for the fact that the decisions under the existing law are not uniform.

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It was held, directly, that the joint creditors could not vote for assignee in case of the separate bankruptcy of one partner. (*In re Purvis*, 1 N. B. R., 163.) Yet in that case the joint creditors had proved their debts, apparently without objection.

In *Wilkins v. Davis*, Lowell, Judge, states the true rule to be that the joint creditors may prove and vote for assignee. (15 N. B. R., 60.)

In the following cases the right of the partnership creditors to prove their debts in the separate bankruptcy is conceded: *In re Frear* (1 N. B. R., 660); *In re Pease* (13 N. B. R., 168); *United States v. Lewis* (13 N. B. R., 33); but no question as to their right to vote for assignee arose.

There are a number of other cases which indirectly touch this question. They are those upon the effect of a discharge granted to one partner in his separate bankruptcy.

The law is (Section 5119) that "a discharge in bankruptcy, duly granted, shall . . . release the bankrupt from all debts, claims, liabilities, and demands which were, or might have been proved against his estate in bankruptcy." Whether or not a creditor's claim is released by a discharge depends upon its provableness; whether or not he can vote for assignee depends upon his having proved his debt.

Under our present Bankrupt Law there are decisions that a discharge granted to one partner in his separate bankruptcy releases him from his joint as well as individual debts. Such are: *In re Downing* (3 N. B. R., 748, 1 Dillon, 33); *In re Stevens* (5 N. B. R., 112, 1 Sawyer, 397); *In re Abbe* (2 N. B. R. qr., 26); *In re Leland* (5 N. B. R., 222); *Wilkins v. Davis* (15 N. B. R., 60). There are also cases holding that such a discharge does not so release him. Such are: *Hudgins v. Lane* (11 N. B. R., 462); *In re Winkens* (2 N. B. R. qr., 113); and see *In re Noonan* (10 N. B. R., 330); *In re Little* (1 N. B. R. qr., 74); *In re Grady* (3 N. B. R. qr., 54).

These latter cases indirectly decide that the joint debts are not provable, as the former, it seems to me, decide that they are provable in the separate bankruptcy.

Again, it has been held that a joint debt is a provable debt

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under Section 5021, and will support a petition for a separate adjudication against one partner. (*In re Melick*, 4 N. B. R. qr., 26.) This has long been the rule in England (*Ex parte Crisp*, 1 Atk., 133; *Ex parte Elton*, 3 Ves. Jr., 238); and there, notwithstanding the general rule is to the contrary, the joint creditor, who takes out a separate commission, shares in the separate estate *pari passu* with the separate creditors. (Story on Part., Section 278.)

It may, then, be safely assumed that in this country the general current of authority is in favor of the provableness of the joint debts in the separate bankruptcy. It follows, from the language of the Bankrupt Act, that if the joint creditors may prove they may vote for assignee. Beyond this it is not necessary to decide the effect of proving the joint debts in the present case.

The action of the register in allowing the joint creditors of Webb & Mullard to prove their debts and vote for assignee is approved, and the prayer of the petition is denied.

UNITED STATES DISTRICT COURT—VERMONT.

SEPTEMBER 18, 1877.

In a contest between the assignee and third parties to ascertain their respective rights as to real estate which had been purchased by the bankrupt and such parties under an agreement to furnish the outlay and share in the profit and loss equally, it is necessary to adjust the partnership dealings to the time of the commencement of the proceedings in bankruptcy and ascertain the exact interest of the bankrupt and each of his partners in such transaction.

Where there are partnership debts still outstanding, on which the bankrupt's partner is liable, such partner is entitled to a lien upon such real estate until the debts are paid, and to indemnify him in case he is compelled to pay them.

GEORGE C. THRALL, v. JOHN W. CRAMPTON,
Assignee, etc., of BEN. K. CHASE, Bankrupt.

WHEELER, J.—This cause has been heard upon bill, answer, replication and examination of witnesses orally by mutual

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consent of the parties in court. From the pleadings and proofs it is found, as matter of fact, that the orator, the bankrupt, and one Goodnow, under an agreement to furnish the outlay and share in the profit and loss equally, purchased and had conveyed to them a parcel of real estate, which included the land now immediately in controversy, for the purpose of dividing it up into lots and selling them to make gain; that they did sell some lots, and build the block in question on another out of common funds, and rented the block for their common advantage; that the orator and the bankrupt, with common funds, and at their equal expense, bought out the interest of Goodnow, and have continued the ownership of the property for the same common purpose to the time of the commencement of the proceedings in bankruptcy, and at that time they owed joint debts, on account of this business, to a considerable amount, which the orator is still holden to pay, one of which is secured by mortgage on the property, and the rest of which have been proved against the estate of the bankrupt in the hands of the assignee. And on a settlement of the joint dealings in respect to these transactions and this property, there would be a considerable balance due from the bankrupt to the orator. This controversy is wholly as to the rights, respectively, of the orator and the assignee in the real estate left, and the relief they are entitled to in respect to it in this proceeding. And here the assignee holds legally and equitably the precise rights of the bankrupt, and the orator is entitled to the same rights and relief in respect to them as against the assignee, that he would have been entitled to as against the bankrupt, if this controversy had arisen between him and the bankrupt. (*Mitchell v. Winslow*, 6 Law Reporter, 347.) And here again these rights are to be determined wholly upon the relations of the orator and the bankrupt as between themselves, and not with any reference to rights of others to deal with them in view of what their relations to each other were, or were held out to be. In this aspect, if the dealings had been with personalty as they were with this realty, there could have been no fair question but that this common sharing of

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outlay, profit, and loss would have made them partners in fact (Colly. Part., Sec. 3.) This real estate could not be bought, handled, sold, and conveyed by all of those engaged in the adventure, or a part of them for all, so readily nor with so much freedom as mere personal chattels could, but when the business was properly transacted according to the requirements of the law in respect to the property dealt in, the rights of those engaged in the result were the same as they would have been in the result of similar transactions in personalty. Thus there could be a partnership in dealing in real estate, although the transactions in that property could not be carried out by conveyance of one or a part of several for all, but the conveyances would have to be by all the owners in person or by written power of attorney, according to the statute of frauds and the requirements of the registry system. (Coll. Part., Sec. 3; *Dudley v. Littlefield*, 21 Me., 418; *Dyer v. Clark*, 5 Met., 562; *Rice v. Barnard*, 20 Vt., 479.) The result is that this was a partnership adventure, and the orator and the bankrupt, at the time of the commencement of the proceedings in bankruptcy, held the title to this real estate, subject to such rights and liabilities as would accrue to or against each in respect to it on account of that relation. And the orator and the assignee would hold the same title, subject to the same rights and the same liabilities. There is no question but that in an action of ejectment, or other proceeding at law, under the same circumstances, each would hold an undivided moiety of the estate. (*Blake v. Nutter*, 19 Me., 16; *Goodwin v. Richardson*, 11 Mass., 469.) But in equity, as regards real as well as personal estate, those who purchase and pay for it are considered to be the true owners, and in cases where it is purchased by a partnership, and paid for out of the partnership funds, the partnership is the true owner. And in this respect the partnership represents the partners, according to their respective interests in it, and they are the real owners of the estate in proportion to those interests. The interest of such partner in the partnership assets is what his share would be on an adjustment of the whole partnership dealings. And if, on such adjustment, one's share should be

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greater or less than according to his share originally, he would be by so much the greater or lesser real owner in the partnership property, whether real or personal. (*Sigourney v. Munn*, 7 Conn., 11; *Pierce v. Trigg*, 10 Leigh., 406; *Dyer v. Clark*, 5 Met., 562; *Lake v. Craddock*, 3 P. Win., 158.) In such cases whoever holds the legal estate, and in whatever proportions, a trust results, in equity, in favor of the real and true owners according to their actual interests. And this is not contrary to the statute of frauds. (Coll. Part., Section 3.) Nor contrary to the statute of Vermont regulating conveyances of real estate, which saves expressly such trusts as may arise or result by implication of laws out of the provision that trusts in lands generally shall be declared in writing. (Gen. Stat. 450, Section 22.) Therefore, in order to ascertain what the respective rights of the orator and the bankrupt to this property were in a court of equity at the time of the commencement of the proceedings in bankruptcy, it would be necessary to adjust their partnership dealings to that time, and ascertain the exact interest of each.

But there are partnership debts still outstanding on which the orator is liable, and his just rights in respect to the property would not all be saved without securing to him a lien or charge upon the property till they are paid, and to indemnify him in case he is compelled to pay them. That the orator has such a lien is well settled. (Coll. Part., Section 135.) This lien of the partner is carried to such an extent, and is so well defined that through it a right to the partnership creditors to have their debts satisfied out of the partnership property before those of separate creditors can be is wrought out. (*Bardwell v. Perry et al.*, 19 Vt., 292.) This right cannot be saved either to the partner himself or to the partnership creditors through him in proceedings strictly at law, but there the right of each partner must stand according to his aliquot proportion, for want of proper means to take and state the account, and of power and methods to give the appropriate relief. In equity no such difficulties stand in the way, and now, in England, and by the great current of authority in this country, this right of

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each partner is guarded and preserved in proceedings in equity wherever it is necessary in cases of insolvency or bankruptcy, or death of the other partners. (*Darby v. Darby*, 3 Drew., 495; Coil. Part., Section 153; 3 Kent Com., 39; *Hoxie v. Carr*, 1 Sumner, 173; *Dyer v. Clark*, 5 Met., 562; *Pierce v. Trigg*, 10 Leigh., 406; *Washburn v. Bank of Bellows Falls*, 19 Vt., 278.)

Decree for orator to be drawn according to these views.

UNITED STATES CIRCUIT COURT—E. D. MISSOURI.

SEPTEMBER 19, 1877.

The bankrupt must give a satisfactory explanation of deficits which are shown in the assets of his estate, or pay over the amount thereof to the assignee.

Where the bankrupt fails to account for a large amount of property, he will be ordered to pay over the value thereof where it appears that his wife has property which is not shown to have come from third parties, and it appears that since the bankruptcy he has carried on business as the agent of his wife.

In re P. PELTASOHN and M. PULMACHER.

THE bankrupts were wholesale millinery merchants in St. Louis. The assignee filed a petition in the District Court, representing that the bankrupts had fraudulently withheld from him goods and property to the amount of forty-eight thousand dollars, and asking an order on the bankrupts to show cause why they should not turn over that amount of property to him. The order issued, and the bankrupts appeared and filed a sworn answer denying the charge, and stating that they had delivered to the assignee all their property and effects. The matter was heard by the District Court upon the examination of the bankrupts before the register (admitted in evidence without objection so far as the record shows), and upon the testimony of various witnesses produced by the assignee and by the bankrupts. The testimony, including the examination of the bankrupts, covers about six hundred written

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pages. The bankrupts or their wives, or the persons to whom they alleged that money had been paid just preceding the failure, were not examined as witnesses or their depositions taken.

After a hearing, which occupied several days, the District Court found as a fact that the said bankrupts "have secreted, concealed, and prevented from coming to their assignee herein, property to the value of seven thousand seven hundred and sixty-two dollars and twenty-two cents, belonging to the said estate," and thereupon ordered the bankrupts to pay said sum to the assignee on or before the 8th day of September, 1875. The bankrupts, on the 8th day of December, A. D. 1875, filed their petition in this court for a review of the said order. An answer to this petition was filed by the assignee, and the matter by stipulation and agreement was to be heard in the Circuit Court upon the same proofs upon which it was determined by the District Court.

By *consent*, the case was at the March term, 1876, of this court, referred to S. D. Thompson, Esq., one of the masters in chancery of this court, to report upon the law and the facts. The master filed an elaborate report, in which he states that he has given to the case a thorough examination, and seems to be of opinion that the finding of the District Court against the bankrupts was for a sum too small instead of too large, but as the assignee had prosecuted no proceedings for review, he recommends an affirmance of the order below with costs against the bankrupts. Exceptions were taken to the master's report on the ground that it was not sustained by the proofs, and on these exceptions the cause was submitted to the court.

N. Meyers, for the bankrupts.

A. Binswanger, for the assignee.

DILLON, J.—It is an admitted fact that at *cost* price, the bankrupts had on hand, on January 1, 1873, goods to the amount of forty-one thousand seven hundred and forty dollars and sixty-one cents. They failed in November of that year.

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Between January 1, 1873, and their failure, they purchased goods to the amount of eighty-one thousand five hundred and eighty-nine dollars and fifty-three cents, making stock to be accounted for one hundred and twenty-three thousand three hundred and thirty dollars and fourteen cents. These sums are shown by the bankrupts' books. The books show sales for cash and on credit during this period to the amount of seventy-two thousand five hundred and three dollars and ninety-five cents at *sale* prices. If sold without loss or profit the bankrupts ought to have had on hand at their failure goods to the amount of fifty thousand eight hundred and twenty-six dollars and nineteen cents. The amount actually turned over by the bankrupts to the estate in bankruptcy was sixteen thousand five hundred dollars at cost price, or including fixtures, eighteen thousand dollars. The difference, viz., thirty-four thousand three hundred and twenty-six dollars and nineteen cents—or, if the fixtures be deducted, thirty-two thousand eight hundred and twenty-six dollars and nineteen cents—is to be accounted for.

The bankrupts attempt to account for this large deficit by showing a great decline in the value of goods of this character between January 1, and November 1, and that they had to sell at great loss. Undoubtedly, the old stock, that is, the stock on hand January 1, was not worth its cost price, and sales from that were made on the average greatly below cost; but it is very doubtful whether there was much, if any, loss, indeed, that there was a profit on the goods sold from the new purchases. On the whole, I am not satisfied with the explanations offered for this large and striking deficit, and I think the District Court and the master were justified in reaching the conclusion they did. Certain circumstances, fragrant with suspicion, strongly support this conclusion. I mention these without dwelling upon them.

The change—during the time they had a bookkeeper—of their system of bookkeeping from double to single entry; the loss or non-production of two important books, "bills receivable and payable" and the "stock or sales book," by no means satis-

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factorily accounted for; the alleged increase, by one-half, of the family expenses during 1873, and taking money therefor without any real increase being shown; the alleged sending of money to Europe to poor relations, and payments to a relative in this country, not other wise shown to be true than by the unsupported statement of the bankrupt—this at a time when they were claiming to be anxious to reduce expenses, and when they were embarrassed; and particularly the statement of Peltasohn that his wife had five thousand dollars or six thousand dollars, and had had since 1871, or before that, which she kept in her house in bank bills and had never invested—the profits, as he alleged, of business which she had conducted on her own account, and which, I must say, under the circumstances, is very improbable; and the further fact that since the bankruptcy the bankrupts have gone into business as the professed agents of their wives.

In short, such a case was made against the bankrupts as to call upon them to explain these circumstances of suspicion, and they have not done so. They were not even examined as witnesses on their own behalf in the District Court.

The exceptions to the master's report should be disallowed, and an order should be here entered affirming the order of the District Court, with costs, including the fee of the master of two hundred and fifty dollars (not excepted to), and that a mandate go to the District Court to proceed with the execution of the order complained of, the same as if the petition for a review thereof had not been brought.

Ordered accordingly.

UNITED STATES DISTRICT COURT—NEVADA.

SEPTEMBER 25, 1877.

A judgment recovered pending the bankruptcy proceedings in an action begun before, and based upon, a provable debt, is itself provable.
A creditor having such a judgment has an interest in the question of discharge and a right to be heard thereon.

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Such judgment will be released by a discharge duly granted to the bankrupt judgment debtor.

In re WILLIAM STANSFIELD.

Lewis & Deal, for the motion.

Charles N. Harris, opposed.

HILLYER, J.—This is a motion to dismiss the specifications filed in opposition to the bankrupt's discharge, upon the ground that the opposing creditor has not a provable debt, and consequently no interest in the question of discharge.

The petition for an adjudication was filed against the bankrupt May 21, 1874. With his own consent he was adjudicated a bankrupt the same day. At the time the petition was filed two suits were pending against Stansfield, wherein J. H. Rice was plaintiff. Both suits were begun April 30, 1874. One was a foreclosure suit, and the other assumpsit, upon promissory notes. In the latter suit Stansfield appeared and filed a demurrer May 11, 1874, which having been overruled, and he failing to answer within the time allowed, judgment upon his default was entered against him July 27, 1874.

In the former suit Stansfield and wife appeared and demurred May 11, 1874. The demurrer was overruled and a final decree entered July 30, 1874. The mortgaged property was sold under the decree, and after applying the proceeds to the payment of the debt of Rice an unpaid balance remained of over seven thousand dollars. The decree directed that the unpaid balance should be docketed upon the coming in of the sheriff's return, and the plaintiff have execution therefor.

By Section 5119, R. S., the discharge releases the bankrupt from all debts which were or might have been proved against his estate.

The debts for which the decree and judgment were rendered were provable, and had they not been put into judgments would have been barred by the discharge, except, of course, that Rice would have had the proceeds of the mortgaged property to apply to the payment of one of them.

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Treating the balance docketed in the foreclosure suit as substantially a judgment (1 Comp. L. Nev., Sec. 1309), the question upon this state of facts is, whether the bankrupt's certificate, if obtained, will discharge these judgments of Rice?

And this involves an inquiry as to whether the debts which did exist at the filing of the petition in bankruptcy, upon which the judgments are based, are so merged in the judgments that they can no longer be said to be "debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy?" (Sec. 5067.) Are the judgments new debts, or the old debts in a new form?

In England, the cases all agree that against such judgments the defendant may have relief by motion for a perpetual stay of execution, which is always granted (*Bouteffour v. Coates*, 1 Cowp., 25; *Blandford v. Foote*, id., 138; *Willet v. Pringle*, 5 B. & P., 193, and many others); but, as an English statute formerly prescribed this relief, the cases, it is said, come with less authority than they otherwise would. (*Clark v. Rowling*, 3 Com., 216.)

In America, a decided weight of authority holds that, to do justice, the courts will look behind the judgment in cases like the present, and if the debt upon which it is founded would have been barred, the judgment is barred.

All the authorities agree that the cause of action is merged in the judgment, and can never be the basis of another suit between the same parties.

But, while adhering to this doctrine, all of our State courts, except those of Maine and Massachusetts, recognize the limitation to it, that the judgment procured pending the question of discharge is discharged when the cause of action would have been.

Cases directly in point are: *Ewing v. Peck* (17 Alabama, 339); *Imlay v. Carpentier* (14 Cal., 173); *Dresser v. Brooks* (3 Barb., 429); *Clark v. Rowling*, *supra*; *Fox v. Woodruff* (9 Barb., 498); *Downer v. Rowell* (26 Vt., 397).

Other cases involving the same principle hold that the courts will look behind the judgment to see whether the debt

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is one which the discharge would release, and give relief to the debtor or creditor as justice shall require. (*Betts v. Bagley*, 12 Pick., 571; *Owens v. Bowie*, 2 Md., 457; *Bostwick v. Dodge*, 2 Doug., 331; *Parks v. Goodwin*, 1 Mann., 35; *Wyman v. Mitchell*, 1 Cow., 316; *Raymond v. Merchant*, 3 Cow., 147.)

The result of the cases is thus stated by Mr. Freeman in his work on Judgments, Section 245: "It has been uniformly held that whenever a cause of action, existing at the time of filing the debtor's petition, was of such a nature that the discharge would have affected it, any judgment recovered thereon prior to the decree of discharge will be affected to an equal extent, and that within the meaning of those laws (bankrupt and insolvent laws) such judgments are never to be regarded as new debts, arising subsequently to the filing of the petition."

Opposed are cases in Maine and Massachusetts upholding the technical doctrine of merger, and refusing to recognize the limitation or exception to the doctrine which has been stated above. (*Bradford v. Rice*, 102 Mass., 472, and cases cited; *Pike v. McDonald*, 32 Me., 418; *Uran v. Houdlette*, 36 id., 15.)

In the courts of the United States the decisions since the passage of the present Bankrupt Act are not uniform. Supporting the doctrine that the debt is not merged in the judgment, so as to defeat the operation of the discharge, are the following cases: *In re Brown* (3 N. B. R., 584); *In re Vickery* (id., 696); *In re Crawford* (id., 698). Opposing are: *In re Leibenstein* (4 C. L. N., 325); *In re Williams* (2 N. B. R. [Qr.], 79), and *In re Gallison* (5 N. B. R., 353). The weight of authority and of the reasoning are, in my judgment, decidedly against the application of the doctrine of merger, so as to prevent the bankrupt Stansfield obtaining the benefit of his discharge, when granted, by way of release of the judgment of Rice. The only doubt arises in dealing with Section 5106 of the Bankrupt Act. Does the fact that the bankrupt may have a stay of pending suits until the question of his discharge is de-

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cided amount to an opportunity of pleading his discharge, so that a neglect to apply for a stay is a neglect to avail himself of a defense to the suit? The affirmative of this proposition is maintained forcibly in the above cited cases of *Bradford v. Rice* and *In re Gallison*. I am not, however, satisfied that the privilege given the bankrupt in Section 5106 should have the effect of overturning the general rule, that a judgment obtained as those of *Rice* were is released if the debt would have been.

It was at one time thought that, upon the bankruptcy of the owner of the equity of redemption pending a foreclosure suit, no decree could be entered until the assignee was made a party. The Supreme Court have declared the law to be otherwise. If the assignee chooses to let the suit proceed, he stands as any purchaser *pendente lite* would. (*Eyster v. Gaff*, 13 N. B. R., 546, 1 Otto, 521.) The fact that the title was cast upon him by operation of law is unimportant.

If, then, the assignee finds that the value of the mortgaged property is less than the just claim against it, he will have no interest to intervene, and will let the suit proceed. The decree will be valid to establish the amount due the creditors, and to give a good title to the purchaser of the property.

In the suit of *Rice* to foreclose his mortgage, it is not likely the Bankruptcy Court would have stayed proceedings on the application of the bankrupt, in the absence of any action by the assignee, except to stay execution for the balance remaining unpaid after the sale of the mortgaged premises.

Under Section 5075 the value of the mortgaged property must be ascertained either by agreement between the creditor and the assignee or by sale under the direction of the court.

When the assignee permits a pending foreclosure suit to go to final decree without intervening, he must, in my judgment, be held to have agreed to that mode of ascertaining the value of the property subject to the lien of the mortgage, and the amount of the debt the creditor may prove. After a sale under the decree, and the application of the proceeds to the payment

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of the creditor's secured debt, the balance, whether docketed as the statute of Nevada permits or not, is a provable debt.

In reference to the other judgment in the action of assumpsit, it appears to me that, although the bankrupt might have had a stay of proceedings by applying to the proper court therefor, yet his failure to do so does not invest the judgment rendered with any other qualities than it would have had if the suit had proceeded by leave of the Bankruptcy Court; that is, to fix the amount upon which the judgment creditor should receive dividends. The right to a stay is a qualified one. If the amount of the debt is in dispute leave may be given to proceed to judgment. If the amount is not in dispute, there is no need of proceeding with the suit to fix it; but if, nevertheless, the suit is permitted by the court, the assignee, and the bankrupt to go on to judgment without objection, the only effect of it is to fix the amount of the provable debt.

That appears to be the view taken by the Supreme Court in *Norton, Assignee, v. Switzer*. (3 Otto, 355.)

The suit was assumpsit brought by Switzer at first against John and Mary Hein. Pending the suit, upon the suggestion of Switzer that the defendants had taken the benefit of the Bankrupt Law, and that Norton was their assignee, the District Court of Louisiana ordered Norton to be made defendant, in his capacity of assignee, in the place and stead of the Heins.

Process was personally served on Norton, but he failed to appear, and judgment was rendered against him. This judgment was affirmed by the Supreme Court of the State, and taken by Norton to the Supreme Court of the United States.

Upon these facts it was held that the State Court had jurisdiction to pronounce the judgment, but that the only effect of it was to establish the amount due Switzer as a basis for dividends. Speaking of the provisions of the Bankrupt Act in this connection, and especially of Section 5106, the court uses this language: "Actions pending in favor of a creditor, . . . at the time the debtor is adjudged bankrupt under the present Bankrupt Act, if no objection is made by the assignee or the Bankrupt Court, may, due notice being first given to the as-

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signee, be prosecuted to final judgment to ascertain the amount due to the creditors; but the judgment will be effectual and operative only to establish the validity and amount of the claim. Notice in due form having been given to the assignee, the judgment may be filed with him as an ascertainment of the amount due to the creditor and as a basis of dividends, but it is effectual and operative only for that purpose." So far as appears in the case, the bankrupts did not apply for any stay of proceedings, nor did the creditor get leave of the Bankruptcy Court to proceed for the purpose stated in Section 5106. And I understand the court to hold that a judgment in favor of a creditor pending the bankruptcy proceedings in a suit begun before, has only the limited operation stated, although the bankrupt may have failed to apply for a stay, and no express leave of the Bankruptcy Court was given to proceed in the suit to judgment. In other words, the fact that the judgment is rendered under such circumstances, of itself, makes such judgment special in its character under Section 5106.

The failure of the assignee or the Bankruptcy Court to object amounts to leave to go on with the suit to judgment. *Qui tacet consentire videtur.*

Following what I conceive to be the law as declared in *Norton v. Switzer*, I must hold the only effect and operation of the judgment rendered in the action of assumpsit in favor of Rice to be to establish the amount of his claim as a basis for dividends. As a consequence, the judgment is a provable debt, will be released by a discharge duly granted to Stansfield, and Rice is a creditor having such interest in the question of discharge as entitles him to be heard thereon.

Motion overruled.

In re Armstrong.

UNITED STATES DISTRICT COURT—VERMONT.

AUGUST 15, 1877.

Where the mortgage sought to be set aside was executed within the time specified in the Bankrupt Act, with a view to give a preference, the fact of repeated promises to pay, which were not kept, together with knowledge on the part of the creditor of a large amount of debts due by the bankrupt at or prior to that time which he was unable to pay, *Held*, to be reasonable cause for the creditor to believe that the insolvency which in fact existed did exist.

Where the creditor taking such mortgage knew of other unsecured debts which his debtor could not pay, and that a large part of the property was common to all from which to get their pay, *Held*, that he knew that the mortgage was made in fraud of the provisions of the Bankrupt Law.

In re AUGUSTINE B. ARMSTRONG. WILLIAM ROOT, Assignee, v. JOHN HILLIARD.

WHEELER, J.—Upon hearing in this cause on bill, answer, oral testimony taken pursuant to written stipulation filed, and argument of counsel, there is no question made but that the mortgage sought to be set aside was made within the time prescribed to be subject to this proceeding; nor but that the bankrupt was insolvent, and made it with a view to give a preference to the defendant; but question is made as to whether the defendant received it having reasonable cause to believe the bankrupt was insolvent, and knowing it was made in fraud of the provisions of the statute relating to bankruptcy.

The debt due the defendant was quite large, and had stood during considerable time. He had been urging payment more than two years, and received several promises that it should be paid at specified times, which had not been kept. It clearly appears that he had known for considerable time that there were other debts to an amount greater than his, for he has testified that on inquiry he was informed by the bankrupt about six months before that it would take a sum greater than twice his debt to pay all the debts. It is true, as has been argued, that the bankrupt was not in mercantile life, but was a farmer, and prompt payment was less to be expected and failure to pay

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would excite less suspicion than if he had been a trader, or banker; but still repeated failure to pay when promised is not usual among men of his class, and when repeated times enough would come to be quite out of the usual course of business, and indicate inability.

The question as to cause for belief is whether in this case it had, at the time of the mortgage, got to that that the defendant either knew or ought to have known the bankrupt, because he could not, did not pay according to the usual course. There was a promise to pay when a child that the defendant wanted the money for became of age in 1874, and another to pay when another child became of age soon after, and another to pay at the expiration of thirty days that expired just before the mortgage was given, none of which were kept. So many successive failures to meet engagements were not to be expected of a man in the otherwise apparent circumstances of the bankrupt, without some unusual cause; and, in connection with the knowledge of other debts that the defendant had, would naturally indicate to him that want of ability to pay was the cause. These indications, as now viewed, were, within the meaning of the law according to the settled interpretation, reasonable cause for him to believe that the insolvency which in fact existed did exist.

As to whether the defendant knew the mortgage was made in fraud of the provisions of the statutes relating to bankruptcy, it is necessary in order to avoid it that he should have known it would operate to the contrary of what the effect of those provisions would be. The effect of those provisions would be to divide the property of the bankrupt, liable for debts, ratably among his creditors without preference of any of those then unsecured over the rest. He knew there were other unsecured creditors to a large amount whom the bankrupt could not pay more than he could him; that a large part of the property was common to all from which to get their pay, and he must have known when he took the mortgage that if it was valid to secure his debt, he was lessening their chances to get their pay as much as he was improving his own to get his, and that he was thereby obtaining a preference over the rest. So he knew what

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the effect would be, and the effect he knew of would be fraudulent in the eye of the provisions of those statutes.

It is urged that there was such an agreement to mortgage, made before, that taking this one was not fraudulent. But the evidence, although it shows that security was talked about, fails to show any definite agreement to make this, or a similar, or in fact any, mortgage earlier than this one was made, and therefore it cannot be found that this mortgage was made in pursuance of a previous agreement to make it earlier. This makes it unnecessary to consider what sort of an agreement in that direction would be sufficient for that purpose.

For these reasons let a decree be entered setting aside the mortgage, with costs.

UNITED STATES DISTRICT COURT—INDIANA.

In voluntary proceedings, creditors whose debts were contracted prior to January 1, 1869, are not to be counted in ascertaining the number and value of creditors consenting to a discharge in the absence of assets. The assent of such a creditor is a nullity.

In re EDWARD E. WHEELER and JAMES D. RIGGS.

APPLICATION for discharge.

The bankrupts' estates paid nothing to their creditors. They applied for a discharge, and procured the assent of one-third in value and one-fourth in number of the creditors whose claims had been proven. One of these was Mrs. Eliza Wheeler, whose claim was for seven thousand dollars, of which four thousand dollars had been contracted prior to 1869. The creditors opposing a discharge applied to prevent it by claiming that since, under the law, a creditor whose claim was made prior to 1869 could not oppose a discharge, it followed that the cred-

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itor could not availably consent to a discharge. Mrs. Wheeler's claim in full only made the required value of assent.

P. Hornbrook, for bankrupts.

Iglehart & Son and *Denby & Kumler*, for the creditors.

GRESHAM, J.—The Bankrupt Act of 1867, as amended July 27, 1868, and July 14, 1870, furnishes the provisions which constitute Section 5112 of the Revised Statutes, which reads as follows: "In all proceedings in bankruptcy commenced after the first day of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors, to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case, at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted prior to the 1st of January, 1869.

There is here no distinction made between voluntary or involuntary cases. In all proceedings in bankruptcy the discharge of the bankrupt is made to depend upon the payment of fifty per cent., or, failing that, upon the assent of a certain proportion in number and value of his creditors, who have proved their claims and to whom he is bound as principal. A restriction is placed upon the creditors; it is only those whose claims accrued after January 1, 1869, whose assent is indispensable; none whose debts were contracted prior to that date are to be taken into the account. Their assent is not necessary, and they are not to be counted for the purpose of determining whether the requisite number and value have assented. The provision does not apply to them.

The amendment of 1875 makes important changes in this provision as to discharges. It declares that in compulsory or involuntary bankruptcy, no provision of the law as it then

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stands, requiring the payment of any proportion of the debts of the bankrupt or the assent of any portion of his creditors, as a condition of discharge from his debts, shall apply. But the involuntary bankrupt may, if otherwise entitled, be discharged by the court in the same manner, and with the same effect, as if he had paid the required per cent., or as if the requisite number and value of creditors had assented. It changes the terms of discharge in voluntary cases, by reducing the required payment to thirty per cent. And it declares expressly that "the provision in Section 33 of said act of March 2, 1867, requiring fifty per centum of said assets, is hereby repealed." The amendment concludes with a repeal of all acts and parts, or acts inconsistent with that act, June 22, 1874.

The effect of this repeal, so far as the involuntary class of bankruptcy proceedings is concerned, is clear enough. Indeed, without words of repeal, the substitution of new provisions covering the whole ground of the former legislation on that subject, would operate as a repeal by implication. The effect of the express repealing language is confined to the repeal of so much of Section 33 (now Section 5112, Rev. Stat.) as requires fifty per cent. Nor will it be easy to show any inconsistency between the last clause of Section 5112 by which the creditors whose debts were contracted before the 1st of January, 1869, are excluded from the provisions for payment and assent, and any of the provisions of the amendment.

That clause of exclusion stands unrepealed, and is in full force to-day.

It follows, therefore, that a bankrupt who finds himself unable to pay thirty per cent. on the debts proved against him, is not required to obtain the assent of those creditors who became such before January 1, 1869. The assent of those of later date is alone necessary. To apply these views to the case in hand. The bankrupts, Edward E. Wheeler and James D. Riggs, having applied for discharges, and being unable to show a sufficiency of assets, as required by the act, are attempting the alternative of getting relief by means of the assent of creditors. If they are restricted to the assent of creditors whose

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claims originated after 1869, the required number and value have not assented; and to escape this dilemma they present the assent of a single creditor whose claim is of earlier date. With this assent, if admitted, the scale is turned in their favor.

But this cannot be allowed. The act imposes upon creditors of this class a disability. The provision for paying thirty per cent. is in express language declared not to apply to them. They are not to be counted in ascertaining the number and amount of which the majority are required to assent. If they do not constitute any part of the quorum, they have no right to vote yea or nay. The creditors of later date alone constitute the body of voters. They can assent to the discharge, or, by withholding their assent, can prevent the discharge. This is their exclusive privilege, and that privilege cannot be interfered with by the creditors of an earlier date. For these reasons the assent of such a creditor is simply a nullity, and the discharge must be refused.

An order will therefore be entered that unless the bankrupts do, within twenty days, procure the assent of the required number and amount of creditors whose claims have originated since January 1, 1869, the petition for discharge do stand dismissed, with costs.

UNITED STATES CIRCUIT COURT—W. D. PENNSYLVANIA.

SEPTEMBER 22, 1877.

The Bankrupt Law does not prescribe any rule or furnish any method for ascertaining the character of distributable assets. That is a subject of preliminary judicial inquiry, to be determined by legal principles of recognized controlling applicability.

As to questions touching the tenure of real estate, the Federal Courts are to be governed by the laws and decisions of local tribunals of the country where such real estate is situated.

Where real estate has been held by partners as tenants in common, the classification thereof as partnership assets, in the schedule filed by them, will not change the nature of the title to the prejudice of the rights of separate creditors.

In re Zug et al.

An appeal to the Circuit Court is allowed only upon final decrees of the District Court in a suit in equity by or against an assignee where the sum in controversy exceeds five hundred dollars.

In re C. ZUG & CO.

BILL to review order of the District Court distributing proceeds of sale of bankrupts' real estate.

McKENNAN, J.—This controversy arises out of the distribution of the proceeds of sale of certain real estate of the bankrupts, which are claimed, on one hand, by the partnership creditors, and on the other by the creditors of the individual members of the firm. This real estate was the product of partnership assets, was conveyed to Christian Zug, one of the partners, individually, was used in carrying on the firm business, and while being so used, Christian Zug conveyed to the remaining partner, Charles H. Zug, his heirs and assigns, one-fifth part of it. Both deeds were duly recorded, so that apparently C. Zug and C. H. Zug were tenants in common of the property in the proportion of four-fifths and one-fifth respectively.

To which class of creditors is the fund produced by the sale of this real estate to be applied?

The Bankrupt Law provides for the primary payment of the firm debts out of the partnership assets, and of individual debts out of the separate estate of each partner, but it does not prescribe any rule or furnish any method for ascertaining the character of distributable assets. That is a subject of preliminary judicial inquiry, the result of which must be determined by legal principles of recognized controlling applicability.

The methods of acquiring and transferring title to real estate are peculiarly matters of local jurisprudence and regulation. "It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which a title to it can pass from one person to another." (*McCormick v. Sullivan*, 10 Wheat., 192. See also *United States v. Crosby*, 7 Cranch, 116; *Kerr v.*

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Moon, 9 Wheat., 565 ; *Clark v. Graham*, 6 Wheat., 577 ; *Darby v. Mayer*, 10 Wheat., 465.) Whatever rules, then, are established, either by statutory enactments or the decisions of local tribunals, touching the tenure of estate within their territorial jurisdiction, must be accepted as the law by which the Federal Courts, when they are called on to pass upon such questions, are to be governed. So the highest Federal Courts have repeatedly decided. In *Jackson v. Chew* (12 Wheat., 162), says Mr. Justice Thompson, "The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law establishing a rule of real property has been settled in the State Courts, the same rule will be applied by this court that would be applied by the State tribunals. This is a principle so obviously just, and so indispensably necessary, under our system of government, that it cannot be lost sight of." So also said Mr. Justice Baldwin, in *McQuestney v. Heister* (9 Casey, 444, note) : "We must administer the jurisprudence of the State in this court as it bears on the rights of the parties, and decide them precisely as the courts of the State might." And again in *Beauregard v. The City of New Orleans* (18 How., 502) the court say, "The constitution of this court requires it to follow the laws of the several States as rules of decision wherever they properly apply. And the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the State, especially when applied to the title of lands. No other course could be adopted with any regard to propriety. Upon cases like the present the relation of the courts of the United States to a State is the same as that of its own tribunals. They administer the laws of the State, and to fulfill that duty, they must find them as they exist in the habits of the people, and in the exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the State and the Union would be productive of the greatest mischief and confusion. (*Jackson v. Chew*, 12 Wheat., 153.)"

These cases—and they have been consistently followed by

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numerous others—sufficiently show how firmly established in the Federal Courts is the rule of conformity to the decisions of the State tribunals in questions touching the title to real estate.

By whatever tenure, then, the courts of this State would adjudge the real estate, represented by the fund in controversy, to have been held, so we must decide. And upon this subject the law of the State seems to be as well settled, by a series of long-adhered to decisions of its highest court, as is the rule which makes it our guide.

From *McDermet v. Laurence* (7 S. & R., 438), through a long train of decisions to *Ebbert's Appeal* (20 P. F. S., 79), the Supreme Court of the State has held, with unshaken constancy, that a recorded conveyance of title to real estate to the members of a partnership, as tenants in common, could not be changed, as to purchasers, mortgagees, and creditors, by parol evidence that it was purchased with partnership assets, and was used for partnership purposes, but that such a result could only be effected by an appropriate written instrument. In *Hale v. Henrie* (2 Watts, 145), Mr. Justice Sargeant says: "No averment of any right by parol, or by what is still less, the nature of the fund which pays, or the uses or purposes the property is applied to, can be allowed to stamp a character on the title inconsistent with that appearing on the deed and record, to the prejudice of third persons. . . . In conformity, therefore, with the suggestion of Tilghman, C. J., in *McDermet v. Laurence*, after a review of the American and English cases on the subject (and, I think, in accordance with the course of legislation in Pennsylvania, on the modes of acquiring title to real estate), where partners intend to bring real estate into the partnership stock, we think that intention must be manifested by deed or writing, placed on record, that purchasers and creditors may not be deceived." This doctrine is reaffirmed in *Ridgway, Budd & Co.'s Appeal* (3 Har., 177); *Kramer v. Arthurs* (7 Barr., 170); *Lancaster Bank v. Myley* (1 Har., 544); *Cummings' Appeal* (1 Casey, 268); *Erwin's Appeal* (3 Wr., 535); *Lefevre's Appeal* (19 P. F. S., 125); and *Ebbert's Appeal* (20 P. F. S., 79). In *Lefevre's Appeal*, Mr. Justice Sharswood

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reviews most of the cases on this subject, and demonstrates that the doctrine of *Hale v. Henrie* rests upon such a foundation of repeated authoritative recognition, that it must be regarded as the settled law of the State, after stating the principle upon which some of the cases apparently in conflict with *Hale v. Henrie* were decided, that the purchase of property by one partner in his own name, by the use of partnership assets, raised a resulting trust in favor of the firm, and that the equities of joint creditors could only be worked out through the equities of the respective partners, he says: "When the partners during the continuance of the firm, have all agreed to the appropriation of the funds to the purchase or improvement of real estate in the private name or names of one or more of the partners, no one of them has any equity to have such property applied to the joint debts; and it follows that the joint creditors have no such equity." This has peculiar applicability to the present contention. For although the title originally acquired by Christopher Zug was paid for with partnership assets, he subsequently conveyed to his copartner, Charles H. Zug, a share of it in exact proportion to his interest in the partnership stock. They thereby became tenants in common of the property, in relative proportions corresponding to their original equities, viz., partners, the trust, if there was any, ceased to exist, and no subsequent use of the property could change the character thus impressed upon the title. Neither of the partners, under these circumstances, would have any equity against the other to insist upon the application of the property, in the first instance, to the payment of firm debts, and so the joint creditors could not have any. Under the law of the State, it is clear, then, that down to the time of the bankruptcy, the real estate in question was not partnership property, but the separate property of Christopher and Charles H. Zug.

It was agreed, however, that the classification of this real estate as partnership assets in the schedule filed by the bankrupts, had the effect of changing the nature of the title, and of converting what was before the separate property of the individual partners, into property of the firm. Independently of

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the reason upon which the rule of law before adverted to mainly rests, viz., the protection of strangers, purchasers, mortgagees, and creditors, and of the due registration of the instrument by which it might be sought to effect such a change, the argument is answered by the operation of the Bankrupt Law itself. By the terms of the act, the title of the trustees to all the bankrupt's property relates back to the date of the commencement of the bankruptcy proceeding. They took it impressed with the character with which it was invested at that time. They cannot change that character to the prejudice of any one's rights, much less can this be done by the bankrupts, after they have parted with all control over it, and it has passed *in grêmio legis* for the benefit of creditors.

This court is therefore of opinion that the District Court rightly adjudged the fund in controversy to be assets of the individual members of the firm of C. Zug & Co., and ordered its distribution accordingly; and that the bill of review must be dismissed at the cost of the complainants.

An appeal was also taken from the order of the District Court, which it is moved to quash. An appeal is allowed only upon final decrees of the court, in a suit in equity instituted by or against an assignee in bankruptcy where the sum in controversy exceeds five hundred dollars. As the record does not show that the order complained of was of that character or was made in any such suit, no appeal lies from it, and the motion to quash is, therefore, allowed.

UNITED STATES CIRCUIT COURT—W. D. MISSOURI.

A suit by an assignee to recover debts due the estate is barred by the limitation contained in Section 5057, where the summons was not issued within two years from the time when the cause of action accrued, although the petition in such suit was filed within such time. 6 FEB 4 82

WALKER, Assignee, etc., v. TOWNER.

THIS is an action brought to recover three thousand five

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hundred dollars as the balance due by defendant upon a subscription by him to the capital stock of the North Missouri Insurance Co., of which the plaintiff is the assignee in bankruptcy. The petition in this case was filed March 20, 1876; but the summons was not issued (by direction of plaintiff's attorney, as stated in the plea of the statute of limitations below mentioned) until November 1, 1876, and was not served until November 2, 1876. The petition alleges that the company was adjudicated a bankrupt November 8, 1873; that the plaintiff was appointed assignee on March 21, 1874, and that on July 3, 1874, the District Court, on a petition presented by the assignee, found "that it is necessary, for the purpose of paying the indebtedness of the said company, to collect the whole of its assets, including the unpaid stock," and thereupon "ordered that the said assignee *proceed forthwith* to collect from the stockholders of said company the full amount due and unpaid on the shares of stock by them respectively held in said company."

The defendant answered. The second and third special defenses set up the statute of *limitations* prescribed in the Bankrupt Act. It is alleged in said defenses that the deed of assignment from the register in bankruptcy to the plaintiff as assignee, was dated March 23, 1874; that the order of the Bankruptcy Court assessing all stockholders, etc., was made July 3, 1874; that plaintiff's petition in this action was filed herein March 20, 1876; the writ issued November 1, 1876, and service had on defendant November 2, 1876. It is also alleged that service of process was countermanded by plaintiff for an indefinite time, and that plaintiff, of his own accord and without the fault of defendant, forbore to issue process or to prosecute said suit until said issue of process, November 1, 1876.

To this plea of the statute of limitations the plaintiff demurred, and it was on this demurrer that the case was submitted to the court.

N. Myers, for the plaintiff.

Albert Blair, for the defendant.

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DILLON, J.—The plaintiff's petition to recover in this case was filed within two years from the date of the order of the District Court to the assignee to collect the unpaid stock, but by direction of the plaintiff's counsel to the clerk, the writ of summons was not issued until more than two years from the date of said order had elapsed. The effect of this is conceded to be the same as if the petition had not been filed until November 1, 1876, which is more than two years from the time when the assessment or order to collect by the Bankruptcy Court was made. If, under the second section of the Bankrupt Act as found in the Revised Statutes, Sec. 5057, any suit for the collection of assets by an assignee in bankruptcy is barred by the two years' limitation therein prescribed, then the present action is barred, if the facts set forth in the plea are true.

This is an important question, and it has been thoroughly argued by counsel. Since this case was submitted the same question came before Mr. Justice Miller, in the Kansas Circuit, at the June Term, 1877, in the case of *Payson, Assignee, etc., v. Coffin*.

The learned justice, after argument and consideration, there held that the two years' limitation in the Bankrupt Act applies to suits by assignees to collect the debts and assets of the estate, as well as to suits relating to specific property. The opinion was orally pronounced, but this conclusion was regarded as the almost necessary result of the language of Section 2 of the Bankrupt Act of 1867, particularly the words: "But *no suit* at law or in equity shall *in any case* be maintainable by or against such assignee, . . . unless the same be brought within two years from the time the cause of action accrued for or against such assignee," which was not intended to be changed, in substance, by the Revised Statutes, Secs. 4979, 5057; and this conclusion was considered to be strongly supported by the views of the Supreme Court in *Lathrop v. Drake* (13 N. B. R., 472, 1 Otto, 516); *Claflin v. Houseman* (15 N. B. R., 49, 3 Otto, 130), and *Bailey v. Glover* (12 N. B. R., 24, 21 Wall., 342), and by the obvious policy of the Bankrupt Act in requiring speedy settlement of estates in bankruptcy. In

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Bailey v. Glover, supra, Mr. Justice Miller, *arguendo*, observed: "To prevent this" [protracted litigation and delays in closing the estate] "as much as possible, Congress has said to the assignee, 'You shall commence *no* suit two years after the cause of action has accrued to you, nor shall you be harassed by suits when the cause of action has accrued more than two years against you. Within that time the estate ought to be nearly settled up, and your functions discharged, and we close the door to *all litigation* not commenced before it has elapsed.'"

The decision in *Payson, Assignee, v. Coffin, supra*, has authoritative force in this circuit, and it is needless to enforce the arguments by which it may be sustained as a sound exposition of the limitation provisions of the Bankrupt Act. It is true that views have been expressed by judges which might lead to a different conclusion, as in *Sedgwick v. Casey* (4 N. B. R., 496); *Smith v. Crawford* (9 ib., 38); *Re Krogman* (5 ib., 116); *Bachman v. Packard* (7 ib., 353); *Stevens v. Hauser* (39 N. Y., 302); *Union Canal Co. v. Woodside* (11 Pa. St., 176); *Re Conant* (5 Blatchf., 54); but the weight of judicial opinion is with the judgment of Mr. Justice Miller, in *Payson, Assignee, v. Coffin*. (*Mitchell v. Great Works Milling Co.*, 2 Story, 648, 660; *Pritchard v. Chandler*, 2 Curtis, C. C., 488; *McLean v. Lafayette Bank*, 3 McLean, 185, 188; *Norton v. De la Villebeuve*, 1 Woods, 168; *Miltenberger v. Phillips*, 2 Woods, 115; *Comegys v. McCord*, 11 Ala., 932; *Harris v. Collins & Cartwright*, 13 Ala., 388; *PaULDing v. Lee*, 20 Ala., 753; *Pike v. Lowell*, 32 Me., 245; *Archer v. Duvall*, 1 Fla., 219; *Lathrop v. Drake*, 13 N. B. R., 472, 1 Otto, 516; *Clafin v. Houseman*, 15 N. B. R., 49, 3 Otto, 130; *Bailey v. Glover*, 12 N. B. R., 24, 21 Wall., 342.)

Whether any cause of action accrued prior to the order of July 3, 1874, it is not necessary to determine. Judgment will be entered overruling the demurrer to the plea of the statute of limitations.

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SUPREME COURT—MICHIGAN.

JUNE, 1876.

Where the former assignee of the bankrupt, a second mortgagee, was made a party defendant in a suit to foreclose the first mortgage, and died after entry of a decree *pro confesso* but before final decree, and his successor is not made a party to the suit, a sale will not affect the second mortgage, and the assignee will be permitted to redeem.

NOYES L. AVERY, Assignee, etc., of ALEXANDER BLAKE v. MARTIN RYERSON and others.

Standish, Fuller & Standish, for complainant.

Albert G. Day, and Gray & Luton, for defendant, Court-right.

GRAVES, J.—On October 13, 1866, Elihu Cooper mortgaged the south-east quarter of section two, town eleven north, range thirteen west, to the defendants, Martin Ryerson, Charles T. Hills, Henry H. Getty and one Ezra Stevens, for four hundred dollars of purchase-money, payable in two equal annual payments. The mortgagees composed the firm of Ryerson, Hills & Co., and Stevens afterwards died. About a year and a half later, and on the 28th of May, 1868, Cooper made a second mortgage to Alexander Blake for thirteen hundred and ninety-nine dollars, payable one-half in two, and one-half in three years. Both mortgages were accompanied by Cooper's notes, and both were duly recorded. Shortly after this last mortgage was given, and on the 10th of June, 1868, Blake was adjudged a bankrupt in the District Court at Grand Rapids, on the petition of his creditors, and Wilder D. Foster was made official assignee, and Blake's estate, including this last mortgage, was duly assigned. In January, 1871, Mr. Foster, as official assignee, took steps in the Circuit Court of the United States to foreclose this mortgage. He filed a bill therefor against Cooper and wife, and finally, and on the 15th of June, 1871, a decree and order of sale were passed. In this proceeding there

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was found due on the mortgage and notes. the sum of sixteen hundred and ninety-three dollars and forty cents, and sale was ordered to be made at any time after July 24, 1871. No further steps have been taken in the case. In this state of things Ryerson, Hills & Getty, as surviving members of the firm of Ryerson, Hills & Co., afterwards, and on April 16, 1873, filed their bill in the Circuit Court for the county of Newaygo in chancery to foreclose the first mortgage, and Wilder D. Foster was made a defendant under an allegation that "as assignee of Alexander Blake he had, or claimed to have, rights and interests in the premises," "or in some part or parts thereof, as subsequent purchaser, incumbrancer, or otherwise."

The bill showed nothing further respecting Foster's relation to the subject-matter of the suit. The subpoena was personally served upon him, and on the 15th of September, 1873, the bill was taken as confessed for want of appearance, and an order of reference was entered. Five days thereafter, that is, on the 20th of September, 1873, Mr. Foster died, and on the 15th of October, following, a final decree was made for a sale of the land at any time after April 17, 1874. The amount reported due by the commissioner was two hundred and ninety-eight dollars and eight cents, being thirty-five dollars too much. On the 20th of April, 1874, the premises were sold under the decree to the defendant, Courtright, for eight hundred and five dollars, and the commissioner gave his deed on the same day.

The surplus money was paid into court. The decree was not enrolled, or the sale confirmed, until nine days later. - In less than two months after Mr. Foster's death, and less than one after final decree, and less than seven after the bill was filed, and when it was necessary to wait more than five months before a sale could lawfully occur, the complainant in this cause was appointed assignee in the place of Mr. Foster, and he has remained such assignee since that time. Notwithstanding the amplitude of the time, Ryerson & Co. made no pause in the prosecution of their foreclosure on account of the death of Mr. Foster and the temporary vacancy in the assigneeship, and took no notice whatever of these occurrences and the consequent

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want of a defendant to represent the Blake mortgage. On the contrary, they pressed the case and conducted it, as though nothing had happened, to computation, decree, and sale. Complainant, Avery, was ignorant of the foreclosure proceedings until the day succeeding the sale to Courtright, and having then learned about it, he went at once, in company with Cooper, the mortgagor, to Courtright, and proposed to redeem and offered to repay him, but the offer was refused. Cooper offered in addition a quantity of wood, and still Courtright persisted in his refusal. Under these circumstances, in less than three weeks after the sale, namely, May 8, 1874, Avery filed this bill in the court below to redeem.

The defendant, Courtright, answered, and the other defendants allowed the bill to be taken as confessed. Proofs having been taken, the court below dismissed the bill on final hearing. Whether, in view of Foster's situation as official assignee in bankruptcy, and of the proceedings had in the Federal Court to foreclose the Blake mortgage, it was competent, without permission of the Bankruptcy Court, to make him a defendant in the suit brought by Ryerson and others in the court below, so as to affect the right under the Blake mortgage, we shall not inquire, because we do not think the question is of any practical importance in this controversy. And for the same reason we shall not pause to ascertain whether the bill of Ryerson and others was aptly framed in any event to bind through Foster the right based on the Blake mortgage. The objection now made, that Avery is not shown to have obtained permission to bring this suit from the Court of Bankruptcy, if of any force in theory (1 Dan. Ch. P., 311, 4th Am. ed.), is sufficiently answered by the circumstance that it has not been pleaded in any way. By the sale to Courtright a sum was obtained much larger than was necessary to satisfy the debts and costs, as determined in that case, and as before stated, the balance was paid into court. And it appears that Cooper, the mortgagor, gave his order on the register, for this surplus, to Avery, but that Avery did not use it. On the contrary, he passed it to Courtright's solicitor, and the evidence is pretty plain that this occurred in

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an attempt to bring about a redemption by negotiation, which failed. There is not the least reason for saying that Avery received this order with any idea of taking the surplus money as an act of acquiescence in Courtright's claim that his purchase had cut off the Blake mortgage.

The fact has no such meaning. Avery does not appear to have yielded at any time to Courtright's position. He was insisting upon the right to redeem, and he was trying to bring it about without litigation, and he manifestly got the order to enable him to get the money back to Courtright in case of amicable redemption.

Moreover, it is to be noticed that the answer asserted no such ground of defense.

It follows that the point urged by counsel, that Avery's acceptance of this order concluded him, is quite untenable. It seems to the court that on the case exhibited the complainant's equity is clear. The value of the land was and is much greater than the price Courtright paid, and he is seeking to make a profit, and complainant to avert a loss on the part of Blake's estate. The Blake mortgage, as before mentioned, was recorded, and it remains an incumbrance and foundation for redemption, unless cut off by the decree and sale in the case of Ryerson and others. It was not cut off thereby, because when the decree and sale were made respectively, no party to the suit had, or appeared, or was supposed to have, any right or interest in it, or power or control over it. (*Brown v. Thompson*, 29 Mich., 72; *Cooper v. Martin*, 1 Dana, 25; *Haines v. Beach*, 3 Johns. Ch., 459; *Bell v. The Mayor*, 10 Paige, 49; *Watson v. Spence*, 20 Wend., 260; *Fuller v. Van Geesen*, 4 Hill, 171; *Brainard v. Cooper*, 6 Seld., 356; *Requa v. Holmes*, 16 N. Y., 193; S. C., 26 N. Y., 338.)

Mr. Foster having died before decree, the right to bind the Blake mortgage by the action dropped, and the after-proceedings were of no force against it.

If Foster had been sole administrator of Blake's estate, and in that character had been joined as defendant, no one would have questioned the effect of his death. Every one would con-

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cede that the decree made after his death could not operate against the mortgage belonging to the estate he represented. The principle is the same here. Ryerson and others were not compelled to join him as defendant at all. It is not a question of jurisdiction as against the mortgagor or owner of the equity of redemption, or a question whether the decree can be impeached. But the point is whether the decree can bind unrepresented interests. Ryerson and others could foreclose Cooper without being bound to include subsequent incumbrancers. They might have left out the representative of the Blake mortgage in the first place, or they might have done so afterwards, by amendment of the bill, or by voluntary dismissal as to him, and there was no inherent and vital objection to their proceeding after his death without a defendant in his place, if satisfied to leave the case so shaped that it could only reach Cooper's equity of redemption and could not affect the Blake mortgage. But the suit could not be made equally to affect that mortgage, whether there was or was not a party representing it. A decree given when there was no one in the cause in any way representing the Blake mortgage, could not affect that mortgage.

If Ryerson and his co-complainants had purchased at the foreclosure sale it would hardly be thought admissible to argue that they had acquired a title which cut off this second incumbrance. And yet, in view of the principle which really governs the question, Courtright's position gives him no higher right to make such a claim than they would have had. When Mr. Foster died, the representation of the Blake mortgage fell into abeyance, and remained so until Avery's appointment. The suit became defective in respect to that incumbrance, and this defect, under the actual circumstances, was not susceptible of cure prior to that appointment. But beyond this interest there was no abatement. It is not unworthy of notice that Ryerson & Co. were not caused to encounter any special difficulties in the prosecution of their foreclosure for the want of some one to represent the Blake mortgage. They were not placed in a situation where they must either proceed without a representa-

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tive of that interest as a party or unduly delay obtainment of the fruits of their action.

The interval between Mr. Foster's death and Avery's appointment was short, and not long enough to hinder a sale at the earliest moment permitted by law. Had it been otherwise, however, we cannot doubt but that an application to the Bankruptcy Court for an appointment would have been successful. In conclusion, we find that the Blake mortgage has not been cut off, and it appears to the court that complainant, as the representative of the right resting upon it, has, in coming forward to redeem, an equity paramount and superior to that of Mr. Courtright.

Several topics alluded to and authorities cited in the elaborate brief of Mr. Courtright's counsel are not specially noticed. They do not appear to be strictly pertinent to the essential ground of the controversy. The decree below will be reversed, with the costs of both courts, and a decree for redemption will be entered in proper form hereafter in accordance with the principles of this opinion.

The other justices concurred.

UNITED STATES DISTRICT COURT—INDIANA.

SEPTEMBER 25, 1877.

The bankrupt must apply for his discharge before the final report and discharge of the assignee.

In re CROSS.

GRESHAM, J.—In this case the bankrupt filed his petition for discharge September 17, 1877. The assignee in the cause had rendered his final account, and received his discharge from the register November 1, 1876.

The question in the case is made under the amendment to the Bankrupt Act approved July 26, 1876. (Statutes at Large,

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vol. 19, p. 102.) That amendment provides that Section 5108 of the Revised Statutes be amended to read as follows: "At any time after the expiration of six months from the adjudication of bankruptcy, or, if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts." The amended provision is expressly extended to "all cases heretofore or hereafter commenced."

The original provision on this subject, as in the section cited, differs from the amendment in this: Instead of the words, "before the final disposition of the cause," the original act reads in their stead, "within one year from the adjudication of bankruptcy." So that originally the bankrupt was required to apply for his discharge within a year after the adjudication, whereas, by the amendment, he is required to apply "before the final disposition of the cause."

What is meant in this amendment by the final disposition of the cause cannot be a matter of doubt. But two principal objects are contemplated by a proceeding in bankruptcy: 1. The administration and distribution of a bankrupt's estate. 2. The discharge of a bankrupt from his debts. It is plain the amendment does not contemplate the latter as the final disposition of the cause, for that is the part of the case yet to be disposed of. The final settlement made by the assignee, and the discharge of that officer from his functions, constitute, within the meaning of this amendment, the final disposition of the bankruptcy.

Under the act as it originally stood, this provision was variously interpreted. Congress, however, interposes to fix a new period, and declares that the bankrupt may ask for his discharge before the case is so disposed of, or, in other words, before the assignee has completed his administration and received his discharge. If any liberality of construction was indulged before this amendment, there seems to be no place for it now. Congress evidently intended to fix a limit within

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which a discharge could be asked for, and they very reasonably repealed the arbitrary limitation of one year, and substituted one not open to the objection that the estate remained unsettled—that is, that the period for applying for discharge must not be later than the final report and discharge of the assignee. Such, I think, is the only conclusion that can be reached, for it is the only one that gives any effect to the legislation of Congress.

This is substantially the view taken by the District Court of the United States for the Northern District of New York, and sustained on review by the Circuit Court for the same district, in *Re Brightman and Losee* (15 N. B. R., 213). The application for discharge comes too late, and is therefore rejected.

SUPREME COURT—MISSISSIPPI

APRIL, 1876.

To exempt a debt from the operation of a discharge on the ground of fraud, it must be tainted with fraud in its inception. If the contract was fair and honest when made, the benefit of a discharge will not be cut off by any subsequent fraudulent conduct on the part of the debtor in respect to it.

Where the bankrupt bought the business of another, agreeing to pay his debts and hold him harmless, a discharge will release him, although he has made false representations that he has paid one of such debts.

The better and more logical pleading is not to attempt to avoid a discharge by averments in the declaration, but to reply such matter in response to the plea.

BROWN, RANDALL & CO. v. H. F. & W. P. BROACH.

J. J. Shannan, for plaintiffs in error.

Hamm & Fewell, for defendants in error.

SMITHALL, J.—H. F. Broach and W. P. Broach, with F. Brown and J. M. Roberts, constituted the commercial partnership under the name of Broach, Brown & Co., doing business at Meridian. On the 9th of January, 1871, the plaintiffs, H.

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F. Broach and W. P. Broach, sold out their interest in the goods and business and assets to S. J. Randall and J. J. Griffin, with the advice and concurrence of W. F. Brown and J. M. Roberts, with whom a new partnership was formed, under the name of Brown, Randall & Co., which undertook and promised to pay the indebtedness of Broach, Brown & Co., and hold the plaintiffs harmless.

Of the debts so agreed to be paid was one of six thousand dollars, to J. H. Garner, of Mobile, existing in the form of an open account. The defendants did not pay this debt, but in fraud of the plaintiffs' rights, and without their consent or knowledge, made to Garner certain notes fraudulently signed with the name of Broach, Brown & Co., thereby continuing the liability of plaintiffs for said debt. Brown, Randall & Co. were payees of these notes, who indorsed them, waiving notice, etc., and delivered them to Garner. In that form they were several times renewed. The defendants represented to the plaintiffs that they had paid the debt, which was untrue. But the liability of the plaintiffs was continued without their knowledge until the 2d of June, 1872, when the defendants became insolvent, and filed their petition in bankruptcy.

Garner brought suit on the notes, and plaintiffs were compelled to pay one thousand two hundred dollars on the notes, and five hundred dollars attorney's fee for defending the suit.

Because of the conduct of the defendants the plaintiffs took no step to compel them to pay the debt. The second count alleges, in addition to the foregoing, that defendants repeatedly informed the plaintiffs that they had assumed the debt and had procured the plaintiffs' discharge therefrom, and induced plaintiffs so to believe. Therefore plaintiffs took no steps to compel the defendants to pay the debts, and were not aware of non-payment until the defendants became bankrupt. On the general issue there was verdict and judgment for the plaintiffs.

1. The first special plea was a discharge in bankruptcy. 2. The second special plea is that defendants did not, in fraud of plaintiffs' rights, and without their knowledge, execute the notes to Garner, but aver, that at the date of its dissolution the firm

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of Broach, Brown & Co. was indebted to Garner by open account, who desired to have it closed by note, but refused to take the note of Brown, Randall & Co.; whereupon two of defendants, W. F. Brown and J. M. Roberts, who were members of the firm of Broach, Brown & Co., signed the name of that firm in liquidation, not fraudulently and without the knowledge of the plaintiffs, of all which the plaintiffs at the time had knowledge, and that said liability was not extinguished; deny that they had falsely stated that they had paid or settled all the debt to Garner, or that plaintiffs were thereby prevented from taking steps to compel defendants to pay the debt. Plaintiffs knew that the debt was unpaid during the year 1871, and up to the 2d June, 1872.

3. The third special plea says that the name of Broach, Brown & Co. was signed to the note by Brown and Roberts, and so was the indorsement of Brown, Randall & Co., because Garner would not take the note of the latter firm, all of which was known to the plaintiffs the 2d of June, 1872, when the defendants were adjudicated bankrupts; that the payment of one thousand two hundred dollars to Garner was voluntary, on account of a promise of defendants which was made prior to the 2d of June, 1872, and was a provable debt in bankruptcy against defendants, not created by the fraud of the defendants, or included in any of the exceptions taken under that act.

The plaintiffs demurred to these pleas for many reasons. To the first, because the discharge was sustained within six months after the petition was filed. It presents no defense. It contains no answer to the declaration. Because the plaintiffs seek to recover damages for the fraud of the defendants, etc. Because the plaintiffs' claim was not provable under the Bankrupt Act, etc. It is said that the discharge in bankruptcy is not a bar to the action, because the debt was created in fraud. The act provides, "No debt created by the fraud or embezzlement of the bankrupt, . . . etc., shall be discharged by proceedings in bankruptcy." The debt must be tainted with fraud in its inception. The vice must come into existence with the debt. If the contract was fair and honest when made, although

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the debtor subsequently may be guilty of fraudulent conduct in respect of it, yet such conduct does not cut off the benefit of the discharge. The liability which the defendants assumed was that they would pay the debts of Broach, Brown & Co., and hold the plaintiffs harmless. It is not averred that there was any fraud in this contract. There is no complaint of that sort. The fraud consisted in the false statements inducing plaintiffs to believe that they were discharged when they were not. This deceit was after the contract had been created, and formed, of course, no inducement or element of it. The averment is that the liability of the plaintiffs was continued to Garner by the new notes, which were executed without the plaintiffs' knowledge. The partnership of Broach, Brown & Co. was dissolved by the withdrawal of the plaintiffs and the formation of the new firm. There was no legal liability of the plaintiffs in these new notes.

After the dissolution of the firm of Broach, Brown & Co., none of its members had power to bind the plaintiffs, without their consent, by making and issuing new notes in the firm name. Such paper only bound the members who signed the partnership name. (*Maxey v. Strong et al.* [MSS.], at this term.) The declaration is obscure, in not averring whether the plaintiffs were compelled to pay one thousand two hundred dollars to Garner by recovery of a judgment, or by compromise, under stress of suit.

We suppose the latter to be meant, for certainly a recovery ought and could not have been had on the *notes* against the plaintiffs. But, when closely analyzed, it is not easy to see precisely how the plaintiffs were damnified by the acts complained of. When they sold to the defendants their interest in the assets and business of Broach, Brown & Co., they still remained the debtors of Garner. Brown, Randall & Co. covenanted to pay that debt and hold the plaintiffs harmless. They parted with their interest in the assets and property for that covenant.

Certainly the plaintiffs have been seriously injured by the failure of Brown, Randall & Co. to perform their covenant.

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But the special grievance is that they deceived the plaintiffs and induced them to believe they were discharged, and kept up the deceit until the defendants became bankrupt, whereby the plaintiffs were prevented from taking steps to compel them to observe their covenant.

But if the falsehood had not been practiced, and the plaintiffs had been aware that Garner's debt had not been paid, what steps could they have taken to compel performance? They might have sued for breach of the covenant, but what would have been the damages they had suffered if they had paid nothing to Garner? If they had paid off the debt they could have recovered the money back, as damages, in a suit on the covenant. The plaintiffs parted with the property on the consideration that their vendees would pay off the debts of the old firm. They still continued liable. In any suit at law the plaintiffs could only have got nominal damages unless they had sustained substantial harm by paying these debts. They had no remedy in chancery to compel a specific performance. There they would have been told their redress was complete at law. We think the plea of discharge in bankruptcy is a good bar to the action. We repeat the suggestion that the better and more logical pleading would have been for the plaintiffs not to have attempted to avoid the discharge in bankruptcy by averments in the declaration, but to have replied such matter in response to the plea. It is much to be desired, for the harmony and symmetry of pleading, that that course shall hereafter be adopted. That view was lately expressed in *Horne v Jacobson, Wolff & Co.* (52 Miss., 185). We avail of this occasion to reiterate it. We conclude that the declaration does not set out a cause of action from which the defendants were not released by their discharge in bankruptcy.

Instead of sustaining the demurrer to the first special plea, it ought to have been carried back, applied, and sustained to the declaration. That is the judgment of this court.

In re Kingale.

UNITED STATES DISTRICT COURT—VERMONT.

OCTOBER, 10, 1877.

Where a bankrupt has been ordered to submit himself to further examination, a departure from the District before the time appointed, without examination, is such a violation of the order that no discharge will be granted until it is rectified by submission to such examination.

In re CHESTER KINGSLEY.

W. L. Burnap, for bankrupt.

A. F. Walker, opposed.

WHEELER, J.—The petition of the bankrupt for discharge having been heard upon the specification of grounds of objection thereto by the opposing creditors, proofs in support thereof and in answer thereto, and argument of counsel, it is thereupon considered that neither the first or second ground of objection is sustained by sufficient proof, and they are therefore overruled.

The others relate to his examination under the order of Court, and together really constitute but one ground. As to that, it appears that he was ordered to submit himself to further examination at a specified time, and departed from the District before the time arrived, without examination had under that order. There were some reasons for this course relating to his personal convenience and welfare, which, if they had been presented to the Court, would perhaps have resulted in vacating the order or requiring the examination to be had at a time more convenient for him. And he may have understood from the course pursued after the order was made that his examination under it was waived, but it does not appear that he was given warrantably to so understand. The departure and failure to submit to the examination was under the circumstances a violation of the order, which, although not so wilful as to deserve proceedings on account of it, has never been rectified, and is

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such that no discharge or other thing moved for by him should be granted until it is rectified by submitting himself to such examination. This ground is therefore sustained on the present hearing, so far that the further consideration of it is postponed until he shall submit himself, or within the District offer to submit himself to further examination on behalf of these opposing creditors. The petition as to this ground is continued to the Wednesday after the first Tuesday in November, that he may comply with this requirement if he shall see cause.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

A judgment recovered after the making of a general assignment for the benefit of creditors, without preferences, and valid by the laws of the State where it is made, creates no cloud upon the title to property transferred by the assignment, although such assignment be subsequently set aside upon the application of an assignee in bankruptcy.

Until a general assignment for the benefit of creditors has been set aside, the title to property embraced in it remains in the assignee; it does not vest in the assignee in bankruptcy by the mere force of an adjudication and his appointment as assignee.

JAMES J. BELDEN, Assignee, etc., et al. v. MOSES SMITH et al.

George Doheny, for complainants.

Warren F. Miller, for deft. Smith.

WALLACE, J.—The main question raised by the demurrer to the bill is whether the judgment of the defendant Smith is a cloud on the title to real estate.

The bill alleged that after Munroe had executed a general assignment of all his property in trust for the benefit of his creditors, without preferences and pursuant to the laws of New York, to the complainant, after complainant had acquired the trust, the defendant Smith recovered a judgment against Munroe, and docketed it in the county where certain real estate was situated, which had been owned by Munroe, and conveyed by him under the assignment to complainant.

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The bill then proceeds to allege that after this judgment was docketed, proceedings in bankruptcy were instituted under which Munroe was adjudged a bankrupt, and the complainant was selected and qualified as assignee in bankruptcy of Munroe, and that thereafter the complainant as assignee in bankruptcy conveyed said real estate, and agreed with the purchaser to remove the apparent lien of Smith's judgment. Then follow general allegations to the effect that the general assignment to complainant is contrary to the spirit and provisions of the "Act of Congress to establish a uniform system of bankruptcy, etc."; that the complainant is embarrassed by the judgment of Smith, and that Smith refuses to remove the cloud from complainant's title.

Without discussing the question whether complainant, after having conveyed the real estate, has such an interest as will enable him to maintain an action to remove a cloud upon the title, it is clear the complainant cannot maintain this bill.

It is well settled that a general assignment in trust for creditors, without preferences, and valid by the laws of the State where it is made, though it may be set aside in favor of an assignee in bankruptcy, as contrary to the provisions of the bankrupt act, is effectual and valid until so set aside; and the grantee in trust takes good title to the property conveyed as against every one but an assignee in bankruptcy.

And it is the settled law in this court that a person recovering a judgment after such an assignment has been made and accepted, acquires no lien upon the property transferred by the assignment, although the assignment be subsequently set aside upon the application of an assignee in bankruptcy. The complainant's case then stands precisely as though he were seeking to remove as a cloud on his title a judgment recovered against a former owner of real estate, after such owner had parted with his title by a valid conveyance.

No authority can be found sanctioning such an action. The judgment is not in any legal sense a cloud upon the title. If the bill had alleged that the assignment in trust was void for any reason as against the judgment, a different question would

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be presented. The only purpose which such an action as this could subserve would be to correct an apparent defect in an abstract of title, and that end could be much more easily accomplished by means of a conveyance by complainant as assignee under the general assignment to the purchaser. In fact, it is difficult to see how the purchaser can acquire any title to the land except by such a conveyance. The title did not vest in the complainant as assignee in bankruptcy by the mere force of an adjudication of bankruptcy and the appointment of complainant as assignee.

Until the general assignment shall have been set aside as void as against complainant as assignee in bankruptcy, the title remains in complainant as assignee under the general assignment. Whether an action would lie by a complainant as assignee in bankruptcy against himself as a defendant as assignee under a voluntary assignment, upon the theory that the voluntary assignment was void as contrary to the terms of the bankrupt act, it is not necessary to discuss. The difficulties in the way of such an action are sufficient to attest to the great impropriety of selecting as an assignee in bankruptcy one who may be called upon to bring an action against himself to invalidate a conveyance to which he has been a party.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

Where an insolvent has been legally released from his obligations by a composition with his creditors, the debt of one of such creditors, who accepted the composition on the written condition that none of the other creditors should receive better terms, is not revived by the payment by the insolvent, after such release, of additional sums to other creditors.

In re FRANK STURGIS et al.

S. Sibley, for bankrupts.

Lyman and Jackson, for claimants.

BLODGETT, J.—This is an application for a re-examination of

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a claim proven by the Matthiesson & Hegeler Zinc Co. against the estate of Frank Sturgis & Co. in bankruptcy.

The claimants insist that in the fall of 1871 the bankrupts were indebted to it in the sum of four thousand eight hundred and ninety-seven dollars and seventy cents, on an open account for goods before then sold and delivered to them.

That bankrupts sought a composition with their creditors on the basis of fifty cents on the dollar of their indebtedness, and the claimants agreed to accept said terms of composition on condition that no greater sum was to be paid any other creditor. They allege, however, that the bankrupts did pay a large sum to Phelps, Dodge & Co., and other creditors, whereby claimant became entitled to the payment of the balance of the indebtedness so compromised. Some time in November last, the firm was adjudicated bankrupt, and this claim is now proven for three thousand five hundred and seventy-three dollars and eighty-four cents, being for one-half the original indebtedness, and interest since December 8, 1871, the time when the composition settlement was made.

The proof shows that soon after the great fire in this city (Chicago) on the 9th of October, 1871, the firm of Frank Sturgis & Co., who had for many years before that time been engaged in business here as wholesale dealers in metals, found themselves unable to pay their debts in full. They offered to pay all creditors, whom they owed over one hundred dollars, fifty cents on the dollar in full settlement of their respective demands. The creditors all accepted the proposition, and were settled with, and have been paid upon the proposed basis. Among the creditors were the present claimants, who agreed to the terms offered, but with the written understanding "*that none of the other creditors, including banks, should receive better terms.*"

There is no proof showing or tending to show that the bankrupts paid more than fifty per cent. to any of their creditors to whom they owed over one hundred dollars at the time of obtaining this composition, with the exception of a firm in Burlington, Iowa, whose claim amounted to one hundred and thirteen dollars, and, on learning this fact, the claimants expressed

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themselves as entirely satisfied with this last transaction—the amount being so small. There is, however, no doubt but what, while negotiating for their settlement, the firm held out to all their creditors that they should consider themselves morally bound to pay in full as soon as they were able. The settlement at fifty per cent., however, was to be a legal acquittal of their indebtedness, and the only obligation to pay the balance was the moral one which any honorable debtor feels, or ought to feel.

There is no proof that any creditor was paid more than these claimants in order to effect the settlement, nor that any false statements in regard to the assets and liabilities of the firm were made in order to obtain a settlement.

It does appear from the proof that after the settlement, and after the firm resumed business, and during the latter part of 1872 and the first half of 1873, the firm paid several of their old ante-fire creditors in full, including the North-western National Bank, Phelps, Dodge & Co., of New York, Morehead & Co., of Pittsburg, and others.

The payments to the bank were made, to a considerable extent, by turning out paper, while that to Phelps, Dodge & Co. was made by way of a sale of a valuable lot and building in this city, owned by Mr. Sturgis, which was heavily mortgaged. P., D. & Co. assumed the mortgage, and, applying the old balance on the amount, paid for the equity.

The firm of Morehead & Co. received their payment by way of a trade, in which they took a house and lot in this city belonging to Mr. Lee, one of the firm, and a part of the balance of the old debt was applied on the purchase-money. One of the other firms has since received some payments to apply on the old debt by means of extra commissions on business transacted with or for them. All these payments were made after the firm was legally released from the obligations to make them, and no doubt were made in pursuance of the intention expressed by the firm to pay all their debts as fast as able. The financial panic of September, 1873, and the subsequent depression in business, has prevented the consummation of this laudable purpose.

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The claimants, as well as many others of the firm's old creditors, remain unpaid except as to the sum accepted in composition.

This court has too frequently recognized the principle to require authority that when a debtor seeks a settlement with his creditors at less than the amount due them, a payment to one of more than the amount held out as the sum to be paid all, vitiates the transaction and authorizes each creditor to collect his entire debt, or at least so operates in favor of the creditors imposed upon. But the creditors here make out no such case. What the debtors paid after being legally released were mere voluntary payments, which could not have been enforced, and although it might seem more in accordance with our ideas of the principles of justice and fair dealing, that, when the debtors found themselves able to apply any of their means in payment of their old canceled obligations, they should have done so *pro rata*, and treated all their creditors alike by making a general dividend, yet I cannot see that their failure to do so revives the old debts, and makes them liable for the payment of these old debts.

Where men have been released from their debts by the statute of limitations, or, as this firm was, by a legal composition, there may have been peculiar personal reasons for acknowledging their moral obligations to one creditor, and afterwards paying him in full, which do not apply to all their creditors, and it would be a harsh rule to say that because a man recognized his moral obligation in one case, it revives a canceled legal obligation toward all his old creditors.

It would make it dangerous for men to recognize moral obligations. While all debts may be equally binding legally, we know that all men recognize a higher depth of moral obligation to pay some more than they do others.

The claim should be expunged.

Phelan, Assignee, v. The Iron Mountain Bank.

UNITED STATES CIRCUIT COURT—E. D. MISSOURI

SEPTEMBER TERM, 1877.

Where an arrangement is entered into between two banks, by which one is to act as agent of the other for clearing-house purposes, and the latter deposits funds with the former sufficient to meet checks drawn upon the latter, the relation of debtor and creditor is created, and such deposits, upon a failure of the former bank, will pass to its assignee.

Where the latter bank has knowledge of the insolvency of the former, a repayment of such deposits by the former on the day of its failure is a preference, and may be recovered by the assignee.

PHELAN, Assignee, v. THE IRON MOUNTAIN BANK.

Broadhead, with *Donavan* and *Conroy*, for plaintiff, cited: *Bank of Commerce v. Russell* (2 Dillon, 215); *In re Robert Hosie* (7 N. B. R., 601); *In re Janeway* (4 N. B. R., 100).

Wood & Whitney, with *E. T. Farish*, for defendant, cited: *Perry on Trusts* Par. 2, 18 to 24; *Voight v. Lewis* (14 N. B. R., 543); *Ex parte Sayers* (5 Ves., Jr., 169); *Grant on Banking*, 4, 5; *Morse on Banking*, 26 Ch., 2. As to following trust funds into hands of an assignee: *Cook v. Tullis* (9 N. B. R., 433, 18 Wall., 332); *Brochus v. Morgan* (5 Cent. L. J., 53); *Ex parte Hobbs* (14 N. B. R., 495); *Hamilton, Assignee, v. The National Loan Bank* (3 Dillon, 230).

MILLER, J.—This case was submitted upon an agreed statement of facts, from which it appears that before the Central Savings Bank, of this city, went into bankruptcy, when Mr. Phelan became its assignee, there was an arrangement between it and the Iron Mountain Bank by which the Central Savings acted as the agent of the Iron Mountain Bank for clearing-house purposes, the latter being incapable of entering that association for want of sufficient capital. By the agreed statement of facts made up between the parties and submitted to the court, it appeared that the Iron Mountain Bank undertook to keep on deposit with the Central Savings a sum sufficient to

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meet all its checks, which that bank should be called upon to put through the clearing-house, and that in the main it did so. And it appears that the Central Savings came under an obligation to the Iron Mountain Bank by which it agreed to pay all the checks of the latter whether it had money enough of the latter to meet the checks or not; it had to assume that obligation when it agreed to become the agent of the other bank for the discharge of the checks in that way. Through a considerable course of business, the Iron Mountain Bank had at times on deposit with the Central Savings more money than was necessary to pay those checks, and at times less money, but the Central Savings always met those obligations. The Central Savings kept a regular account with the Iron Mountain Bank, debtor and creditor, as it was bound to do, in regard to the transactions. The Central did not keep the funds furnished for that purpose separate and distinct from other funds, but merely passed the amount to the defendant's credit. When the Central Savings failed, or found that it was going to fail, and after banking hours it found that it had in its possession, beyond what was necessary to pay the checks of that day, some twelve thousand or fifteen thousand dollars on deposit of the Iron Mountain Bank, and it gave them notice to come in and withdraw these deposits, as they would not on the next day protect their checks in the clearing-house. They did come in, and after banking hours the Central Savings paid out, in money and checks, all the deposits of the Iron Mountain Bank.

It is claimed that this was a preference to one of the creditors of the Central Savings, and that the Iron Mountain knew that the Central Savings was in an insolvent and failing condition; and, conceding this knowledge, the only question before the court is whether that was a preference within the meaning of the statute. A very ingenious argument is made by the able counsel, Mr. Wood, to prove that this was some kind of a trust fund, a special trust deposit, which it was the duty of the bank to protect from its general creditors, and turn over to the *cestui que trust*, which was the Iron Mountain Bank.

I am not able to see from the facts in this case that the

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transaction possessed that character. I do not perceive any difference between the deposit and the deposit of any individual doing business with the Central. No special trust relation was created by this transaction in question. It does not follow, because a fund is placed in the hands of a man or corporation, that it can be followed everywhere under all circumstances. And in this particular case there was no means of following specifically the money which was placed by the Iron Mountain Bank in the hands of the Central Savings; because it went into the bank as other money did, was mingled with other money, and paid out in its ordinary business as other money was. There is another consideration which shows the relation between the parties. Why is it that a bank in this or any other city provides clerks to keep accounts, provides and furnishes you, perhaps without cost, a check-book, and goes to a great deal of trouble and expense and liability in securing you against loss by fire or thieves? Why is it that they do these things, and some go further and pay interest for the privilege of having and holding your money? It is because it becomes their money; because the moment you deposit it there it is their money, and that they may make money out of it in the regular banking business. In this case the Central Savings not only consented to pay the checks of the Iron Mountain Bank which were drawn against it, but undertook, in addition to what an ordinary bank does, to take care of and protect its operations in the clearing-house. What was it to get for all this? According to the theory of the plaintiff's counsel, Mr. Wood, they were to hold this fund as a separate and distinct trust fund, with which they could make no operations, which they could not loan out, and which they were to hold until exhausted by checks, and they were to do this for nothing.

The case of the *Marine Bank v. Fulton Bank* (2 Wall., 252), in which I had the honor of delivering the opinion of the Supreme Court, is in point, and is decisive of the case at bar. In that case, the Fulton Bank sent to the Marine Bank of Chicago two notes for collection. The currency at Chicago had at that time become deranged, and consisted exclusively of

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bills of Illinois banks. The Marine Bank sent a circular to its correspondents, informing them that in the disturbed state of the currency, it would be impossible to continue remittances with the usual regularity, and that it would be compelled to place all funds received in payment of collections to the credit of its correspondents in such currency as was received in Chicago—bills of the Illinois Stock Banks—to be drawn for in like bills.

The notes were collected by the Marine Bank and placed to the credit of the Fulton Bank. About a year after the collection made, the New York bank made a demand of payment from the Chicago bank, which was refused, unless the former bank would accept the Illinois currency, *now* sunk *fifty* per cent. below par. The Marine Bank was engaged, like other banks, in receiving deposits, lending money, buying and selling exchange, and the money collected on the two notes in question was not retained in any separate or specific form. The court held that the proceeds of the notes when collected became the money of the collecting bank, and that the depreciation in the currency fell upon that bank. The court in deciding that case said:

“But the truth undoubtedly is, as stated in the second branch of the proposition, that both parties understood that, when the money was collected, plaintiff was to have credit with the defendant for the amount of the collections, and that the defendant would use the money in his business. Thus the defendant was guilty of no wrong in using the money, because it had become its owner. It was used by the bank in the same manner that it used the money deposited with it that day by city customers, and the relation between the two banks was the same as that between the Chicago bank and its city depositors. It would be a waste of argument to attempt to prove that this was a debtor and creditor relation.”

In the case at bar, I cannot see that the relation between the banks was any other than one of ordinary deposit, by which the Central Savings became the debtor of the Iron Mountain Bank, and liable to pay its drafts through the clearing-house.

In re Nelson.

It follows that the assignee is entitled to recover; and the judgment of the District Court, being in conformity with these views, is affirmed.

UNITED STATES DISTRICT COURT—VERMONT.

Subsequent executions create a lien upon all the debtor's property in the sheriff's hands not covered by a prior attachment.

Where an attachment is vacated by the commencement of proceedings in bankruptcy, the lien of subsequent executions is not thereby enlarged; the property passes to the assignee free from incumbrance to the extent of the attachment, and subject to the execution liens as to the excess.

In re M. J. NELSON.

WHEELER, J.—This proceeding has been commenced by a petition of the assignee setting forth that at the commencement of the proceedings in bankruptcy he, as deputy sheriff, had custody of the goods of the bankrupt, by virtue of an attachment on an original writ in favor of Keyes & Co., on a writ in their favor against the bankrupt then and at the time of the petition still pending; second, of other subsequent attachments and executions in suits in favor of other plaintiffs against the bankrupt in which they had respectively recovered judgment and placed executions in his hands in season to change the property, and praying for a determination of the rights of the parties in respect to the property at the time of the commencement of the proceedings, and of their rights now in respect to the sum of three hundred and eleven dollars and one cent, into which, as assignee, he has converted the property and still holds in lieu of the property. None of these execution creditors appear to be parties to the bankruptcy proceedings, nor are they claiming in any manner under them, but are claiming in hostility to them, and for that reason this petition could not be maintained against them as an adversary proceeding.

In order to maintain a proceeding *in invitum* to have the

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rights of parties so interested adjudicated upon, it would be necessary to proceed by regular writ at law or in equity, according to the nature of the case and the relief sought. But in this case the execution creditors have come in and agreed in writing that the facts stated in the petition are true, and that "the court may upon said petition make such order and decision as (to) the disposition of the fund" as may be according to law. In Section 5011, Rev. Stat. U. S., it is provided that in any proceedings within the jurisdiction of the court, "the parties concerned, or submitting to such jurisdiction, may, at any stage of the proceedings, by consent, state any questions in a special case for the opinion of the court, and the judgment of the court shall be final, unless it is agreed and stated in the special case that either party may appeal if in such case an appeal is allowed," etc. In this special case the parties have submitted to the jurisdiction and stated questions in the case, and so the questions submitted are regularly before the court.

At the commencement of the bankruptcy proceedings the goods were the general property of the bankrupt, subject to a first lien by the attachment of Keyes & Co., and to a second and subsequent lien, by virtue of the executions of the attaching creditors. By force of the provisions of Section 5044, Rev. Stat. U. S., the title to the property vested in the assignee, and the attachment of Keyes & Co., having been made within the prescribed time, was dissolved. The liens in favor of the judgment creditors were valid and perfect, the executions having been delivered to the officer within thirty days, according to the provisions of the Vermont statutes (Gen. Stat. 303, Section 94), and he having the actual possession of the property. These judgment liens were not at all affected by the bankruptcy proceedings. Thus far there is no difficulty or real difference between the claims of the counsel of the respective parties. The real question is as to how and where the judgment liens stood when the attachment lien was dissolved, and the property subject to the judgment liens was vested in the assignee. The petitioning creditors and assignee, in behalf of the bankrupt estate, claim that the attachment lien was

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equal in amount to the *ad damnum* in the writ, which is four hundred dollars, and, as that was greater than the amount of the property, covered the whole property and left no room for the judgment liens, and that its dissolution created no room for them. The judgment creditors claim that the dissolution of the attachment made room for their liens, and that, as their liens were subject to the attachment only, as soon as that was dissolved their liens took its place and covered the whole.

But neither of these claims is thought to be well founded to the full extent. Keyes & Co. had a valid lien by attachment which could not as to damages exceed four hundred dollars, for that was the extent of their claim at that time, although the court where the writ was pending might, if within this jurisdiction, raise the *ad damnum* so as to permit them to recover more. The *ad damnum* would not limit the recovery for costs at all, and that recovery might make the whole much beyond four hundred dollars, and extend the lien as far unless it was limited by the direction in the writ as to the value of property to be attached, which might be beyond the *ad damnum* if the authority issuing it saw fit to make it so.

It is not stated in the special case what the amount directed to be attached was. But whatever it may have been the attachment lien would not be measured by it, but would only be limited by it. The measure of their lien was the amount of their debt or claim sued for and their lawful costs of the suit to that time.

To the extent of that attachment lien the judgment liens were restricted, and so far as that covered the property they did not. The same thing that dissolved the attachment vested the property in the assignee subject to the executions. There was no space of time after the attachment was gone and before the property was vested in which the judgment lien could move, or be moved up to take its place.

The bankruptcy proceedings did not enlarge the judgment liens nor change their place, but left them exactly as and where they were before; they covered all of the property in the custody of the officer not covered by the attachment lien.

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After, they covered all the same property in the hands of the assignee, not covered by the right, which was before the attachment lien, and was then vested in him. This leaves to the judgment creditors exactly their rights and gives to the other creditors exactly theirs. These conclusions are in accordance with the opinions of Dyer, J., upon similar questions in Eastern District of Wisconsin (16 N. B. R., 105). The judgment liens stand valid in the order of the attachments. The amount of the demand of Keyes & Co., and costs to the time of adjudication, does not appear.

The cause is referred to the register having charge of the case to ascertain the amount of the demand of Keyes & Co., with costs to the time of the commencement of bankruptcy proceedings, and when that amount is ascertained the assignee is to hold so much of the sum of three hundred and eleven dollars and one cent as is equal to it for the estate of the bankrupt, and to pay over the balance to the execution creditors, so far as the same will go, in the order of their attachments, in satisfaction of their judgments.

UNITED STATES CIRCUIT COURT—E. D. MISSOURI.

SEPTEMBER TERM, 1877.

Where, in a composition proceeding, the statement of liabilities represents a claim as being fully secured, and the creditor is in attendance, but does not participate in the proceedings nor raise any objection to such representation, the claim is not discharged by the composition, but the creditor is entitled to the percentage agreed upon in such proceeding on the deficit left unpaid on realizing such security, whenever ascertained.

JOHN PARET v. MYRON TICKNOR et al.

Action on notes. Defendants pleaded in bar that they had effected a composition in bankruptcy, in manner provided by act of Congress; that plaintiff was duly notified of the various meetings and attended the same; that in the statement of liabilities, plaintiff's claim was *represented*, as plaintiff knew, as

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fully secured by deed of trust on real estate worth more than the amount of debt; that plaintiff did not dissent or object to such valuation, but acquiesced therein; and that it took all their unpledged assets to pay the composition to the unsecured creditors. Plaintiff demurred to the answer.

John R. Shepley and *Henry M. Post*, for plaintiff, cited, *In re Bestwick* (L. R., 2 Ch. D., 485), affirming same case, 1 Ch. D., p. 702.

Nathaniel Myers, for defendants, claimed that the provisions of the English composition act (32, 33 Victoria, Law Journal Statutes, 1869-'70, p. 287), under which *In re Bestwick* was decided, differed materially from the act of Congress, and cited also *In re J. L. Lytle & Co.* (14 N. B. R., 457); *In re Bechet* (12 id., p. 201), and *In re Comstock* (4 Cent. L. J., 145.)

MILLER, J.—Paret was a creditor of Ticknor & Co., against whom proceedings were instituted in bankruptcy. Those proceedings resulted in a compromise under the statute on the subject, by which Ticknor & Co. agreed to pay to their creditors a certain portion or percentage of their debts—25 per cent. Paret was named in the schedule of their creditors, and had notice of the meeting of creditors on this proposition. Ticknor & Co. stated in this schedule that Paret was a fully secured creditor. To this Paret seems to have made no reply in any way, and to have made no objection or given any consent to the compromise. After this Paret sold the real estate, which was the security for his debt, and there remained a considerable balance unpaid of the debt. He brings this suit to collect that balance. It is contended by his counsel that he is entitled to recover all of the debt that was not covered by the sale of the property, which was his security. It is contended by counsel for Ticknor & Co., that they were fully discharged by the compromise proceedings of any claim on account of that debt.

We are of opinion that the law of the case lies between them. I am of opinion myself that the compromise provisions

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of bankruptcy design that every creditor shall receive the same proportion of his debt, and I am of opinion as regards the parties who shall receive, that the secured creditor is a creditor, for that purpose, for all that is not satisfied by his security. And I am of opinion that whenever this fact is ascertained, even after the compromise, that remainder constitutes a debt against the bankrupt, of which he shall pay the same proportion to that creditor that he has paid to the unsecured creditors.

It is here urged very strongly—and the argument is very well put, and it is about the only argument I think worth noticing especially—that Paret, having notice of these proceedings, having notice that the bankrupts had scheduled him as a fully secured creditor, and having taken no exception to that statement, is bound by it. I think Mr. Myers (defendant's counsel), considers it an adjudication of the bankrupt court, or at least considers it conclusive against the plaintiff that his claim was fully secured. I do not take that view of it. I think it probable, but I am not sure about it, but it is my impression now, that if any adjudication had been made and either of the parties had brought to the court the question, so that it could be decided whether the security was a sufficient security, and, if it was not a sufficient security, for what sum beyond it Mr. Paret had a claim, and that matter had been adjudicated, that that would have been an end of that transaction, and that in that compromise order the bankrupt would not have been compelled to provide for the 25 per cent. for any difference. And if it was decided by the court to be a fully secured debt, and the bankrupt had let it go in that way, then the bankrupt would have parted with all his claim to the property, and the creditor would have accepted it in full payment of the debt. It would have been a judicial settlement of the transaction in which the bankrupt would be divested of any right to the property, and the creditor would be divested of any further claim personally against the bankrupt. But this was not done, and it follows, I think, that neither of these results was attained. Ticknor & Co. retained an interest in that property, and before Paret had finally foreclosed his rights in it, they could have redeemed it;

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and if it had been worth ten times the debt, they would have had the right to redeem it and have the advantage of the full value above the debt, from the fact that it remains unadjusted. And so Paret gets advantage of the fact that it remains unadjusted. He can foreclose whenever the proper time comes or whenever by law he will be obliged to do it, and if it sells for less than his debt, he can make Ticknor pay, not the whole of the difference, but 25 per cent. of it; and if it sells for more than the debt, Ticknor and Co. will be entitled to the surplus.

What would have been the result if the parties had formally agreed in writing that the security was ample, we are not called on to say, but we are of opinion that the mere silent acquiescence of the creditor, his mere failure to dissent, does not affect his claim.

The demurrer, however, goes to the entire answer, and as the answer does set up a good defence for all but 25 per cent. of the deficit, the demurrer must be overruled.

DELLON, J., concurs.

UNITED STATES DISTRICT COURT—VERMONT.

OCTOBER 10, 1877.

One who holds a mortgage valid as against the provisions of the Bankrupt Law, with condition broken before the commencement of the proceedings, has a right as against the assignee to all the bark, wood and timber cut from the premises, whether on them or not.

Where such mortgagee has given notice of his claim to the marshal when he seized the property, and to the assignee when he took possession of it, and they afterwards keep possession, they are to be considered as taking it for him, and the expense of securing it should be borne by him.

In re WILLIAM BRUCE.

WHEELER, J.—From this special case submitted to the court by the assignee and James W. Brock, it appears that Brock is mortgagee of a large part or all of the real estate of the bankrupt, with condition of the mortgage broken before

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the proceedings in bankruptcy; that at the commencement of the proceedings there was a quantity of bark, wood and timber on the mortgaged premises, and of logs a short distance from the premises, all severed therefrom by the mortgagee, and grass and other crops standing thereon unharvested; that the mortgage estate is inadequate security, and the mortgagee notified the marshal when he seized the property of the bankrupt, and the assignee when he took possession of it, that he claimed the whole; and that this property and its expenses have been kept separate from the estate. Both claim title to it, and their rights to it are submitted for determination. There is no pretence but that the mortgage is valid against the provisions of the Bankrupt Act, nor but that the assignee took precisely the same estate that the bankrupt as mortgagor had. After condition broken, the mortgagee, as against the assignee, standing in the place of the mortgagor, had the right to all the bark, wood and timber cut from the premises, whether on them or not, and could have maintained an action of trover for it. (*Langdon v. Paul*, 22 Vt., 205.) This shows that the mortgage lien is extensive enough to cover all this property, and that lien is saved by the provisions of the act.

And after the law day had passed, the mortgagor held possession subject to the right of the mortgagee, which was a right to enter and take possession of the land and all crops, even of those that would be emblements, in cases of tenancy where the rules of law relating to emblements would be applied. (1 Wash. Real Prop., 1st Ed., 515.) In this case it does not appear whether the crops are such as would be denominated emblements or not, for none are specifically mentioned except the grass crop, and that, because it would not require annual sowing, would not be. But if some of the other crops are such as would be sown or planted annually, and would be emblements, it would make no difference, for the mortgagor as tenant of the mortgagee is not entitled to emblements. (*Ibid.*, 106.) So the lien by the mortgage was broad enough to cover all these crops if the mortgagee chose to enter and take them, although if taken by the mortgagor before such entry, or some

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equivalent, he would not be accountable to the mortgagee for them.

The timber cut from the land would be a part of the inheritance, and would belong to the mortgagee as a part of the estate after severance, while annual crops, emblements or not, before severance would be a part of the estate, but afterwards not, and only a part of the profits belonging to the mortgagor. (*Walker v. King et al.*, 44 Vt., 601.)

In this case the mortgagee did not actually enter and take the crops, and could not without disturbing the possession of the marshal and assignee, but he went as far in that direction as he lawfully could. He made claim of them in respect to this right, and as they kept the possession and took the crops after that, and still hold them, they must hold them subject to his right to take them, and be considered as taking them for him. As the assignee stands as having taken them for him, the expense attendant upon the taking should be borne by him.

Therefore, let an order be entered that James W. Brock is entitled to this property for the security of his mortgage debt, subject to the claim of the assignee for his reasonable expenses about securing it, and that the assignee deliver the same to him on payment of such expenses, to be ascertained by the register, unless agreed to, or redeem his mortgage.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

MAY, 1877.

Notice of an application to set aside a composition proceeding should be given to all the creditors as well as to the debtor.

Where a composition, partly carried out, is set aside and an assignee appointed, the assignment to the assignee should be made without prejudice to lawful acts done or titles acquired under and by virtue of such composition.

Creditors who have taken the composition should not be allowed to vote for the assignee.

Ex parte HAMLIN. *In re* BRODT.

In February, 1876, a petition in bankruptcy was filed

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against H. D. Brodt, as surviving partner of the firm of R. W. Dresser & Co., and he at once offered a composition, which was finally accepted and ordered to be recorded in April, 1876. It provided for payment of twenty per cent. by instalments, secured by notes, the last payment to be at the end of six months from the date of recording the resolutions.

In February, 1877, one Hamlin filed a petition in the cause, alleging himself to be a creditor of Brodt, and that he and some others had not been paid the composition by reason of disputes concerning the amount of their respective debts, and that Brodt was apparently no longer able to pay the composition; but that the petitioner had reason to believe there were assets which might be reached by an assignee, and praying that the composition might be set aside and for an adjudication of bankruptcy.

After notice to the debtor the petition was granted and a warrant was issued. At the first meeting of creditors a question arose, and was certified to the court, of the right of a creditor who had received his twenty per cent., and had released the debtor, to prove his debt. Certain creditors then filed a motion to vacate the adjudication, or to modify it in such a way that the assignee should not disturb the payments which they had received under the composition.

The evidence tended to show that Brodt had given notes for the instalments of his composition to all the creditors whose debts were undisputed, or with whom he could adjust the amount due, leaving Hamlin, and perhaps two others, out of the account. There was no charge of fraud. Brodt's position was a difficult one, because his partner had attended exclusively to the financial affairs of the firm, and had died suddenly, leaving the business in much confusion. After the composition was recorded, the petitioner, Hamlin, entered into a partnership with Brodt, and had lent him money, and they had disposed of the old stock of R. W. Dresser & Co., and of such new goods as they bought; but the business was not profitable and the new firm was dissolved. Brodt, in the meantime, paid all the composition notes as they came due, with the knowledge of Hamlin.

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A. E. Pillsbury, for the petitioner Hamlin.

B. F. Brooks, J. W. May, E. Avery, and H. J. Boardman, for creditors.

LOWELL, J.—The statute of 1874, ch. 390, § 17, Stats., 184, provides, that if at any time it shall appear to the Court, on notice, satisfactory evidence and hearing, that a composition cannot proceed without injustice or undue delay to the creditors or the debtor, the Court may refuse to accept it or may set it aside, and that the debtor shall then be proceeded with as a bankrupt. Upon examination, I think the point is well taken that “notice” means notice to the creditors as well as the debtor. If the debtor should make the application, as he clearly may, there would be no doubt; but the Court cannot know that a creditor is not acting in concert with the debtor to obtain a reversal of the composition. The notice is undoubtedly intended to be given to the parties interested, and in almost all cases the creditors must be such parties. I was misled by the analogy of petitions for adjudications, and by the fact that the action in cases of this kind heretofore has been upon motions which showed on their face that all the creditors stood on an equal footing. But it is plain that a creditor hostile to the composition, if he could procure the acquiescence of the debtor, might do great mischief in this way. Without committing myself to the position that such notice is absolutely essential in all cases, I hold that it was in this case.

Several creditors having now been heard upon the merits of the question, it is not necessary to vacate the adjudication for a defect of notice, if a new decree of the same sort would follow. I therefore proceed to the other points taken by the creditors, that the remedy of setting aside the composition and going forward in bankruptcy is not appropriate to the case; that the petitioner, having stood by when the composition was entered into, and when the notes were paid, is estopped; that, at any rate, the decree of adjudication should be so modified that it cannot interfere with what has been done under the composition. If the danger which the creditors fear, that the

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title of an assignee appointed at this time will relate back to February, 1876, so that the acts of the bankrupt since that day would all be voidable, were well founded, there would be very strong ground for holding this petitioner and all others having actual or constructive notice of the composition estopped to interfere with it. There was a time when it was thought that annulling proceedings in bankruptcy would render voidable everything done by an assignee; but this fear was quieted by the able judgment in *Smallcombe v. Olivier*, 13 M. & W., 77; and there was a similar case in this country. (*Penniman v. Freeman*, 3 Gray, 245.) It is the law now that to annul or supersede proceedings of this character, means to stay their further prosecution.

So with compositions: the statute authorizes them, the court orders them; and payments made in conformity to a recorded resolution are not preferences. If the creditors are willing to trust a debtor to pay his composition, and exact no mortgage or transfer from him, they authorize him to raise the means for paying it, by dealing with his property. (*Ex parte Burrell*, L. R., 1 Ch. D., 537; *Re Reiman*, 11 N. B. R., 21; *Re Van Auken*, 14 Id., 425); and it cannot be held that the creditors are bound to see each other paid.

There is a hardship, undoubtedly, for those creditors whom the debtor omits from his list, or neglects to pay. In most cases all difficulties would be met by the appointment of an assignee or trustee, to see that the composition is paid, and that all creditors are treated alike. I have not known the objection taken by a creditor in any case, that too much power was left with the debtor. I have not been willing to interpose *mero motu*, because, looking at the statute and its history, I am not satisfied that it intends to insist that there shall always be such security, or any security, if creditors choose to dispense with it. Nevertheless, under our statute, which throws a decision upon the court, I think it might be a sound exercise of discretion in almost all cases to require security, if any creditors asked for it.

I am of opinion that the remedy of bankruptcy is intended

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to reach any case in which it is likely to work a beneficial result for one or more creditors, or for the debtor. The two or three creditors whose dividends have not been paid have other remedies. They may apply to this court in a summary way to require the debtor to pay them, or they may bring actions at law; but I think they may likewise go in bankruptcy, if there is no objection raised. In this case, the debtor consents, and the general creditors have no objection, provided the decree shall be so modified as to express those points concerning the assignee's title which I have already said would be necessarily implied. To this they are entitled, because a decree should be clear, and leave nothing to implication.

The ordinary form of assignment would make the assignee's title relate back to Feb. 6, 1876; and that is the day to which his title will relate; but in the assignment, after the mention of that date, there must be added: "Without prejudice to lawful acts done or titles acquired under and by virtue of the resolutions for composition heretofore recorded in this cause."

Let a certificate be sent to the register that the creditors who have taken the composition have no right to vote for an assignee, and that the assignment should be in a qualified form, substantially as above indicated.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

MAY, 1877.

Where the income of trust moneys is to be paid to the bankrupt during his life, to be applied to the support of himself and wife and the education and support of their children, the trust declaring that the principal and income should be inalienable, the bankrupt takes it as sub-trustee, and is bound to apply it to the purposes named, and, therefore, it will not, upon his bankruptcy, pass to the assignee.

The court cannot apportion such income and give the assignee an aliquot share.

DURANT, Assignee, v. THE MASS. HOSPITAL LIFE INS. CO.

This is a bill in equity, filed by the assignee in bankruptcy

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of the estate of S. K. Williams, the younger, asking that a certain annuity, or some part of it, might be decreed to belong to the complainant, as such assignee. In 1873, S. K. Williams, of Boston, deposited ten thousand dollars with the defendant company, upon trusts, declared as follows: "The said company shall and will, yearly and every year during the natural life of Samuel K. Williams, Jr. (son of said Samuel K. Williams), and after his decease, during the natural life of his wife, Lucy Williams, if she should survive him, the income to be applied to the support of said Samuel K., Jr., and of his said wife Lucy, and the education and support of their children, of Cambridge, in the State of Massachusetts, pay, or cause to be paid, to the said Samuel K. Williams, Jr., or to his said wife, Lucy, in the order and for the purposes above stated, in yearly payments, on the first day of January in each and every year, during the natural lives of the said Samuel K., Jr., and of his wife, Lucy, upon his or her separate order and receipt, to be dated on or subsequent to the several days on which the said several payments shall fall due; which annuity and principal sum are both hereby declared to be inalienable by the respective grantees thereof, and not subject to their debts or control, the first payment to be made on the first day of January next, the same rate of interest as the said company shall actually make and receive upon their capital stock," etc.; with careful stipulations concerning the management and other terms not affecting the question raised in this case; and they agreed that after the death of S. K. Williams, Jr., and his wife, they would pay the principal to the executors or administrators of the father, to be by them distributed among all his grandchildren.

Mr. Williams, the elder, made a similar deposit for each of his several children, and died in 1874, leaving a will, by which a large estate was devised in trust for his children and grandchildren, with full discretion to his trustees as to the mode of applying the income for the benefit of the persons intended to be benefited thereby.

In June, 1876, S. K. Williams, the son, became bankrupt, and the complainant was appointed assignee of his estate, and

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brought his bill asking the court to declare him entitled to the annuity, or to so much thereof as should be found not necessary for the purposes named. The bankrupt has a wife and seven children.

W. B. Durant, pro se. All rights in equity pass by the assignment. Rev. Stats., Sec. 5046.

(a.) Trusts cannot be created with a proviso that the interest of the *cestui que trust* shall not be alienated, or be liable for his debts. (Lewin, Trusts (6th ed.), 89; *Rugely v. Robinson*, 10 Ala., 702; *Robertson v. Johnson*, 36 id., 197; *Dick v. Pitchford*, 1 Dev. and B. Eq., 480; *Re Jones's Will*, 23 Law Times, N. S., 211; *Rochford v. Hackman*, 9 Hare, 475; *Graves v. Dolphin*, 1 Sim., 66; *Blackstone Bank v. Davis*, 21 Pick., 42; *Sanford v. Lackland*, 2 Dillon, 6; *Brandon v. Robinson*, 18 Ves., Jr., 429; *Heath v. Bishop*, 4 Rich. Eq., 46.)

(b.) Bankruptcy is not an alienation under such a proviso. (*Lear v. Leggett*, 2 Sim., 479; *Whitfield v. Prickett*, 2 Keen, 608.)

(c.) Such trusts, to be effectual, must be protected by a clause of cesser, limitation over, or absolute discretion in the trustee. (*Snowdon v. Dales*, 6 Sim., 524; Lewin, Trusts, 90, and cases; *Sanford v. Lackland*; *Graves v. Dolphin*, *ubi supra*.)

(d.) A trust for clothing or support is no exception. (*Green v. Spicer*, 1 Russ. & M., 395; *Younghusband v. Gisborne*, 1 Coll. Ch., 400; *Havens v. Healey*, 15 Barb., 296; *Smith v. Moore*, 37 Ala., 327.) The distinction in *Twopenny v. Peyton*, (10 Sim., 487), and *Godden v. Crowhurst* (10 Sim., 642), is, that trustees were themselves to apply the funds.

(e.) This annuity is not a trust for support; the words only explain the purpose or motive of the founder. (*Spooner v. Lovejoy*, 108 Mass., 529; *Thorp v. Owen*, 2 Hare, 607; *Harper v. Phelps*, 21 Conn., 257; *Lambe v. Eames*, L. R., 6 Ch., 597; *Paisley's Appeal*, 70 Penn. St., 153.)

We maintain that there cannot be a trust upon a trust, and, therefore, that the bankrupt takes the income, during his life, discharged of all trusts.

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(*f.*) If the bankrupt takes the income in trust, we are to have his part of it. (*Rippon v. Norton*, 2 Beav., 63; *Mason v. Mason*, 2 Sandf. Ch., 432; *Rugely v. Robinson*, *ubi supra*.)

The costs of all parties should be paid out of the fund. (*Younghusband v. Gisborne*, *ubi supra*; *Abbott v. Bradstreet*, 3 Allen, 587.)

H. C. Hutchins and *E. W. Hutchins*, for the defendants:
1. So far as this income is to be applied to the support of the bankrupt's wife and children, it is inalienable by him, and not liable for his debts. (*Chase v. Chase*, 2 Allen, 101; *Raikes v. Ward*, 1 Hare, 445; *Crockett v. Crockett*, *id.*, 451; *Woods v. Woods*, 1 Myl. & C., 401; *Broad v. Bevan*, 1 Russ., 511, note.)

2. We go further, to say that, where the trust is to maintain the husband jointly with the wife and children, the assignee of the husband will not be entitled to anything. (*Robson*, Bankruptcy (3d ed.), 397; *Godden v. Crowhurst*, 10 Sim., 642.) It is impossible for a master to say what is necessary, and still more what may hereafter become necessary, for a large and growing family.

3. By the American decisions a trust may be made for the settlor's son and grandchildren, without power of alienation and without liability for the son's debts. (*White v. White*, 30 Vt., 338; *Bramhall v. Ferris*, 14 N. Y., 41; *Wetmore v. Truslow*, 51 N. Y., 338; *Locke v. Mabbett*, 3 Abb. Ct. of App., 68; *Pope v. Elliot*, 8 B. Mon., 56.) The leading cause is *Brandon v. Robinson*, 18 Ves., Jr., 429; and the reasoning is not satisfactory, and has not been accepted in this country; see, besides cases above cited, *Nichols v. Eaton* (13 N. B. R., 421; 91 U. S. (1 Otto), 716); *Rife v. Geyer*, (59 Penn. St., 393); *Wells v. McCall* (64 *id.*, 207). The case cited from New York has been overruled. (*Graff v. Bonnett*, 31 N. Y., 9; *Campbell v. Foster*, 35 N. Y., 361; *Genet v. Beekman*, 45 Barb., 382.)

LOWELL, J.—How far the law of this country generally, or of Massachusetts in particular, conforms to the doctrine of *Brandon v. Robinson* (18 Ves., Jr., 429) I do not care to consider. The question is at this time before the supreme judicial court

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of the State, if I am rightly informed, and is likely to be settled in due course ; but I consider this case to be governed by *Nichols v. Eaton* (13 N. B. R., 421, 91 U. S. (1 Otto), 716.)

The annuity given to the bankrupt was given him in trust for the uses set forth in the contract with the defendant company. It was argued that those words were the expression of a motive, or a wish, on the part of the doner ; but they are the language of command, and there is nothing precatory about them. The payments are to be made to the bankrupt, and after his death to his wife, "the income thereof to be applied to the support of said Samuel K., Jr., and of his said wife and the education and support of his children," and, again, the company agree to pay the income to the bankrupt or his wife, "in the order and for the purposes aforesaid." No doubt his receipt is a discharge, and the company take care not to be responsible for the application of the money ; but that application is ordered, and the wife and children, or any of them, could maintain a bill against the bankrupt for its enforcement. (*Whiting v. Whiting*, 4 Gray, 236 ; *Chase v. Chase*, 2 Allen, 101 ; *Loring v. Loring*, 100 Mass., 340 ; *Cole v. Littlefield*, 35 Me., 439 ; *Wright v. Miller*, 8 N. Y., 9 ; *Lucas v. Lockhart*, 10 Sm. & M., 466.) The point is well put by Mr. Perry, in his excellent work on Trusts, Section 117, that the question to be decided is, whether the settlor intended to impose an obligation, or only to assign the motive for an absolute gift. And I say again, the language is not at all doubtful here ; the son, in the first instance, and his widow, if she should survive him, are to take this income and apply it to the purposes mentioned. I agree with a note of Mr. Perry's to the same section, that the tendency of the later cases is to seek, somewhat less astutely than formerly, to discover trusts in precatory words ; but in no case, late or early, that I have seen, are words like those in this case treated as precatory.

A doubt was suggested in argument whether a trust could be grafted on a trust. Some inconveniences in the working of such a sub-trust were mentioned in a Massachusetts case (*Rich v. Rogers*, 14 Gray, 174) ; but the court, in the later case of

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Chase v. Chase (2 Allen, 101), found them not insuperable. And in all the cases above cited, in which an annuitant or life-tenant has been held to be a trustee, the *corpus* of the property was already in trust, and he was only a sub-trustee, as he is called in *Chase v. Chase, ubi supra*.

Nor is there any difference between a settlement *inter vivos* and a will, in the creation of a trust, excepting that a greater latitude of construction is allowed in ascertaining the intent of a testator, who is supposed to labor under some disadvantages for expressing his meaning, as compared with one who is drawing up a marriage-settlement, or entering into one of the more deliberate transactions of life. As there is no obscurity in the language of this instrument, the difference is unimportant.

Then the question remains: What interest have the creditors of S. K. Williams, Jr., in this annuity? It was conceded at the argument, and is the law, that whatever Williams could have assigned, or his creditors could have reached by any proceedings in equity, can be made available by his assignee for the payment of his debts. There are cases in which the courts have inferred from the terms of the settlement, or from the situation of the parties, that the beneficiaries were to take equal shares *per capita*. One of the earliest of these cases is *Rippon v. Norton* (2 Beav., 63); but the propriety of the decree in that case was questioned in *Wallace v. Anderson* (16 Beav., 533); and such an artificial mode of division could not have been contemplated, and would not be just, in the existing circumstances of this family. There are other cases in which an inquiry has been ordered before a master into the necessities of the wife and children, with an intimation that whatever was not wanted for their support and education would belong to the assignee. Where, however, the trustees have a discretion by which they may deprive the debtor of income altogether, I understand the modern doctrine in England to be that the assignee in bankruptcy will take only what, if any thing, the trustees actually appropriate to the debtor. (*Lord v. Bunn*, 2 Y. & Coll. (N. S.), 98; *Kearsly v. Woodcock*, 3 Hare, 185;

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Trappes v. Meredith, L. R., 10 Eq., 604, reversed on another point, L. R., 7 Ch., 248.)

In England, the assignees in bankruptcy formerly acquired all the debtor's property, present and future, until his discharge; and even now they take it until his discharge, or the close of the proceedings in bankruptcy, whichever event may first occur; and, by the insolvent law, under which some of the decisions were made, his person only was discharged, and the assignees took the whole property, until the debts were fully paid. Under this system it was possible for a court of equity to shape its decrees from time to time to meet events as they occurred. If, for example, the children died or were emancipated, and the trusts as to them were accomplished, it could decree a larger amount to the assignee; and, if more children were born, might vary the decree in an opposite sense. But the assignee under our bankrupt law takes at once whatever interest is assignable, and must sell it promptly in his turn; and what I have to decide is, whether I can decree that any specific part of this annuity has come into his hands to be disposed of in that way.

In principle and reasoning, this case, as I have already said, is governed by *Nichols v. Eaton*, 13 N. B. R., 421, 91 U. S. (1 Otto), 716. There the trustees had a full discretion how to dispose of the income; and it was held that the assignee took nothing. I think the debtor in this case has such a discretion, from the very necessity of the case. The trust does not depend upon the person of the trustee; and I am inclined to think that the supreme judicial court would have power to appoint some other person to receive this income, if it were shown that by reason of his insolvency and its consequences, or for any other reason, the debtor has become unfit to fill the office of trustee; and I think such a new trustee would have a full discretion in the appropriation of the income.

If this is not so, but the bankrupt is entitled to some part of this income, yet I think it impossible for any court to say what that part is; for the reason that it may be a constantly varying quantity, and that it would be both impracticable and unjust

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for me to undertake to decree to the assignee an interest for the life of the bankrupt in any such aliquot part. It is plain that if I cannot do that, I cannot give him anything which will be of value to the creditors. No doubt this amounts to saying that the bankrupt will have some benefit from the trust; but this is the actual result of the English decisions concerning discretionary trusts, which is approved and followed in *Nichols v. Eaton, ubi supra*. This effect is pointed out by Mr. Robson, in his work on Bankruptcy (3d ed.), p. 396; and I do not see how a court can prevent it.

The case is a hard one for the creditors; and I shall be willing to hear the parties further on the question of costs, which was but very briefly touched upon in the argument.

Bill dismissed.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1876.

A creditor may be said to have had reasonable cause to believe that his debtor was insolvent, where the fact of insolvency actually existed, when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor as would lead a prudent man to the conclusion that the debtor is unable to meet his obligations as they mature in the ordinary course of his business.

Assignees may sue to recover the assets of the bankrupt in the Circuit or District Court of a district other than that in which the decree in bankruptcy was entered.

In calculating the time a preference must stand in order to be valid, the day the petition was filed must be excluded.

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DUTCHER, Appellant, v. WRIGHT, Assignee, etc.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin. The facts appear in the opinion.

W. P. Lynde, for the appellant.

E. Mariner, contra.

CLIFFORD, J.—Transfers of property by an insolvent debtor, within four months before the filing of the petition in bank-

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ruptcy against such debtor, with a view to give a preference to any creditor, are forbidden by the Bankrupt Act; and the provision is to the effect that if any such insolvent debtor, within that period and with that view, procures or suffers his property, or any part thereof, to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of his property, within that period and with that view, the attachment or seizure and the payment, pledge, assignment, transfer, or conveyance shall be void, if the person receiving the same, or to be benefited thereby, had reasonable cause to believe that such debtor was insolvent, and that such attachment, payment, pledge, assignment, or conveyance was made in fraud of the provisions of the Bankrupt Act. (14 Stat., 534; Rev. Stat., Sec. 5128.)

Congress has also defined the meaning of certain terms employed in the Bankrupt Act, and has regulated the mode of computing time "in all cases in which any particular number of days is prescribed by the act, or shall be mentioned in any rule or order of court, or general order which shall at any time be made under the same, for the doing of any act or for any other purpose," the rule enacted being that the computation "shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall" be *dies non* within the judicial sense. (Rev. Stat., Sec. 5013, p. 974.) Most of the matters of fact material to the decision of the case are either admitted, or so fully proved that they may be regarded as without dispute. Peterson, being insolvent, was, on the 8th of April, 1870, adjudged bankrupt, pursuant to his own petition filed in the District Court for the District of Minnesota. Prior to that time he had long been engaged in trade, doing business as a merchant in Rochester, in that State. Sufficient appears also to show that the respondents were engaged in trade, doing business as wholesale merchants under the firm name of Dutcher, Ball & Goodrich, at Milwaukee, in the State of Wisconsin; that the said Peterson, on the 8th of December next before the time he was adjudged bankrupt, and long before that time, was

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insolvent, and largely indebted to the respondents for goods, wares, and merchandise theretofore sold and delivered to the bankrupt at his aforesaid place of business; and that the bankrupt did then and there, to wit, on the said 8th of December, with the knowledge, assent, and procurement of the respondents, assign, transfer, and convey to the said respondents certain portions of his property, consisting of promissory notes, securities, mortgages, and other evidences of indebtedness, with a view to give a preference to the respondents over the other creditors of the bankrupt, and in fraud of the provisions of the Bankrupt Act. Proof of a satisfactory character is exhibited in the record to show that the assignment, transfer, and conveyance of the said securities and property were made to the respondents with a view to secure to them a preference over the other creditors of the bankrupt; and that the respondents had reasonable cause to believe that the assignor, transferrer, and grantor was then and there insolvent, and that the assignment, transfer, and conveyance of the securities and property were made in fraud of the provisions of the Bankrupt Act and to prevent the said securities and property from coming to the possession of the assignee of the bankrupt debtor for distribution among his creditors, as required by law. What the complainant charges is, that the securities and property transferred, assigned, and conveyed to the respondents belonged to him as the assignee of the bankrupt; and he prays for an account, and that the moneys collected be paid to him as such assignee, and that the securities uncollected be turned over to him, for the benefit of the creditors of the bankrupt. Process was served; and the respondents appeared and pleaded the following defenses: 1. That the securities and property were not transferred, assigned, and conveyed within four months next before the petition in bankruptcy was filed. 2. That the respondents were not served with process within two years from the time the cause of action accrued. 3. That the District Court for the District of Minnesota had exclusive jurisdiction of the cause of action set forth in the bill of complaint. Instead of replying to the plea, the complainant, under the rule in that behalf, obtained an order

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setting it down for hearing at the next term ; and the parties at the time appointed were fully heard, and the court overruled the several defenses set up in the plea. Pursuant to leave, the respondents filed an answer to the effect following, reference being first made to the admissions which the answer contains : 1. They admit that the insolvent debtor was adjudged bankrupt on the day alleged in the bill of complaint, and that the complainant was duly appointed the assignee of the bankrupt's estate, as therein alleged ; that an assignment of his estate was in due form made to the complainant, as assignee of the bankrupt's estate, and that the same became duly vested in him as such assignee ; that the bankrupt was, on that day, indebted to the respondents in the sum of one thousand seven hundred and forty-one dollars and twelve cents, for goods, wares and merchandise which their firm had previously sold to the bankrupt. None of these facts are controverted ; and it is also admitted that one of the respondents, on the same day, had an interview with the bankrupt at the office of an attorney in the town where the bankrupt resides, in relation to his indebtedness to their firm, for the purpose of adjusting his indebtedness ; and that the bankrupt on that day gave the respondent's firm a note for the amount of his indebtedness to the firm, and that he assigned to the firm the notes and accounts against his customers specified in the schedule exhibited in the record, and placed the same in the hands of the said attorney for collection as collateral security for the note given to the firm, the balance, if any, after paying the note and the expense of collecting the collaterals, to be paid over to the bankrupt. These collaterals, it is admitted, greatly exceeded the amount of the bankrupt's indebtedness to the respondents ; but they allege as matter of defense that they had no reasonable cause to believe, at the time of taking the same, that their debtor was insolvent or unable to pay his debts, and aver that their partner, when he made the arrangement, acted in good faith, and in the full belief that the bankrupt had assets sufficient to pay all he owed, and leave him a surplus of twelve thousand to thirteen thousand dollars ; that he was then in the possession of a valuable stock

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of dry-goods and groceries; and that, from inquiries their partner made of the debtor and the attorney with whom the collaterals were deposited for collection, he, the partner, believed that the debtor had sufficient available assets to pay all his debts, and to leave him a good surplus. Beyond all doubt, the debtor was then insolvent; and it does not appear that the respondents or the active partner made any inquiries as to his pecuniary standing, except at the National Bank, where he was owing one thousand seven hundred dollars, and of the debtor and the depositary of the notes and accounts assigned as collaterals; and they admit in the answer that their partner, in order to perfect the arrangement, found it necessary to hold out the inducement to the debtor, that, if he did not pay or secure what he owed the firm, they would be obliged to sue their claim, and collect the same by due process of law. Aided by such inducements, the partner succeeded, and was permitted to take enough of the debtor's notes and accounts to pay the claim of the firm in full, and the expenses of collecting the notes and accounts, with the understanding that the excess, if any, should be delivered back to the debtor. Times became hard with the debtor early in May preceding the arrangement, as appears by the correspondence exhibited in the record, from which it may reasonably be inferred that the firm were resolved to obtain security, or to enforce payment by legal proceedings. Insolvency, in the sense of the Bankrupt Act, means that the party whose business affairs are in question is unable to pay his debts as they become due, in the ordinary course of his daily transactions; and a creditor may be said to have reasonable cause to believe his debtor to be insolvent when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor as would lead a prudent man to the conclusion that the debtor is unable to meet his obligations as they mature, in the ordinary course of his business. (*Buchanan v. Smith*, 7 N. B. R., 513, 16 Wall., 277; *Toof et al. v. Martin*, 6 N. B. R., 49, 13 Wall., 40.)

Reasonable cause for such a belief cannot arise unless the fact of insolvency actually existed; but if it appears that the

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debtor giving the preference was actually insolvent, and that the means of knowledge were at hand, and that such facts and circumstances were known to the creditor securing the preference as clearly ought to have put a prudent man upon inquiry, it must be held that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained the fact to be so by reasonable inquiry. (*Scammon v. Cole*, 5 N. B. R., 257; *Wilson v. City Bank*, 9 N. B. R., 97, 17 Wall., 473.) Witnesses were examined, the parties were heard, and the court entered a decree in favor of the complainant; and the respondents appealed to this court. Certain important findings of fact are set forth in the interlocutory decree, as follows: 1. That the debtor, on the 8th of December, 1869, was insolvent. 2. That the respondents then and there had reasonable cause to believe that he was insolvent, and that the assignment of notes and accounts set forth in the answer was made by the debtor when insolvent, and with a view to give a preference to the respondents as his creditors, and that they then and there had reasonable cause to believe that the assignment was made in fraud of the provisions of the Bankrupt Act. Suffice it to say, that the proofs and the admissions contained in the answer are sufficient to show that the findings of the Circuit Court are correct, and that the decree there rendered should be affirmed, unless the defenses set up in the plea, or some one of them, can be sustained. Defenses of the kind are not waived by filing an answer to the merits. They were all presented in one plea, but they will be separately considered in the reverse order from which they are set forth in the plea.

1. Suits may be instituted and prosecuted to final judgment by an assignee in bankruptcy to recover the assets of the bankrupt in the Circuit or District Court in a district other than that in which the decree in bankruptcy was entered, which is all that need be said in response to the objection that the District Court, where the suit in this case was commenced, had no jurisdiction to maintain the suit. (*Shearman v. Bingham*, 7 N. B. R., 490; *Lathrop, Assignee, v. Drake et al.*, 13 N. B. R., 472, 91 U. S., 516.)

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2. Assignees have two years from the time the cause of action accrued within which to enforce such a claim, and, inasmuch as the suit in the court below was instituted within that time, the plea of limitation must be overruled. (14 Stat., 518.)

3. Suppose that is so, still it is insisted by the respondents that the notes, accounts, and property were not assigned to them within four months before the petition in bankruptcy was filed in the District Court by the insolvent debtor.

Both parties agree that the petition in bankruptcy was filed April 8, 1870, and it appears, both by the bill of complaint and the plea filed by the respondents, that the notes, accounts and property were assigned by the bankrupt to the respondents the 8th of December of the preceding year. Undisputed as the facts are, the decision must turn upon the construction of the Bankrupt Act. (14 Stat., 534; Rev. Stat., Sec. 5128.) Taken literally, it might be suggested that the phrase, "four months before the filing of the petition," would exclude the day the petition was filed, fractions of a day being forbidden in such a computation; nor would it benefit the respondents if the rule prescribed by Sec. 5013 of the Revised Statutes should be applied, which is, that in all cases in which any particular number of days is prescribed in that title, or shall be mentioned in any rule or order of court, or general order, which shall at any time be made under the same for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day.

Where the phrase to be construed does not contain any expression to the contrary, the enactment is that that rule shall apply, leaving it to be understood that the phrase to be construed may contain words prescribing its own rule in that regard, and that if it contains any inconsistent expression to the contrary, that the rule prescribed in that section shall not necessarily control the meaning of the phrase to be construed.

Apply that qualification to the rule prescribed in Sec. 5013, and still it might be suggested that the meaning of the

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phrase, "within four months before the filing of the petition," is entirely consistent with that rule.

Unless the day when the notes, accounts, and property were assigned, and the day when the petition in bankruptcy was filed, are both included in the computation, the defense fails, and the complainant is entitled to an affirmance of the decree. Neither argument nor authority is found in the brief of the respondents supporting any such rule of construction, and it is believed that no decided case can be referred to, where such a theory was ever adopted. Decided cases may be found in which it is held, where an act is required by statute to be done a certain number of days at least before a given event, that the time must be reckoned, excluding both the day of the act and that of the event. (*The Queen v. The Justices*, 8 Ad. & E., 173; *Mitchell v. Foster*, 12 id., 472; *Zouch v. Empsey*, 4 B. & Ald., 522.)

Search has been made in vain for a decided case in which it is held that both the day of the act and the day of the event shall be included in the computation, in order to ascertain the specified period of time.

Cases may be found in which it is held, that where the computation is to be made from an act done, the day on which the act is done is to be included. (*Arnold v. United States*, 9 Cranch, 120.) Exceptions undoubtedly exist to that rule, and it must be admitted that there are many cases in which it is held that the last day is included, and that the first is excluded. Speaking of the conflict of judicial decision upon the subject, Lord Mansfield said that the cases for two hundred years had only served to embarrass a point which a plain man of common sense and understanding would find no difficulty in construing, and he came to the conclusion that courts of justice ought to construe the words of parties so as to effectuate their deeds and not destroy them, and that "from the date" may, in popular use, and even in strict propriety of language, mean either inclusive or exclusive. (*Pugh v. Leeds*, Cowp., 714.)

Special reference was made to that decision in the case of *Griffith v. Bogert* (18 How., 158), in which this court held to

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the effect that the general rule is to treat the day from which the period of time is to be calculated, or *terminus a quo*, as inclusive, and they applied that rule in the decision of that case; but they remarked in the opinion that "every case must depend on its own circumstances." Thirty years before that, the Supreme Court of New York decided that it was the practice of that court, where an act is to be done within a specified number of days, to consider the day on which notice is given and the day on which the act is to be done, the one inclusive, and the other exclusive, without any particular designation that the one or the other shall be exclusive. (*Gillespie v. White*, 16 Johns. [N. Y.], 117.)

Three of the courts of England, to wit, the King's Bench, the Common Pleas, and the Exchequer, forty-five years ago, adopted the following rule to regulate the practice in those courts: "That, in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to be *dies non* in legal contemplation." (8 Bing., 307.)

Repeated attempts have been made to settle the question, but different rules still prevail in different jurisdictions.

Due weight in every case should be given to the words of the phrase to be construed, and by so doing many of the reported cases otherwise seemingly inconsistent may be satisfactorily reconciled.

Still it must be admitted that it is difficult, if not impossible, to deduce from the reported decisions any rule which will apply in all cases, nor is it necessary to make the attempt in this case, as the court is unanimously of the opinion that the day the petition in bankruptcy was filed must be excluded in making the computation, and that the decree of the Circuit Court is correct. (Rev. Stat., Sec. 5013.)

Decree affirmed.

In re Roseberry et al.

UNITED STATES DISTRICT COURT—INDIANA.

Where one has a valid lien upon property in his custody belonging to another who is on the eve of bankruptcy, and sells the same with the knowledge that bankruptcy is imminent, the sale will not be afterwards disturbed by the court in bankruptcy, if untainted by fraud, and if there has been no sacrifice of the property.

The lien of a factor for his advancements, charges, and commissions is within the meaning of the amendment to Section 5128, Revised Statutes of the United States, which provides that nothing in that section shall be construed to invalidate securities taken in good faith upon the making of a loan, and will be protected in bankruptcy.

*In re WILLIAM N. ROSEBERRY and WARREN
B. ROSEBERRY.*

Goss, Newsom & Co. proved claims against the individual estates of each of the bankrupts, who, previous to the adjudication of bankruptcy, were partners as W. B. Roseberry & Co. Upon the application of the assignee, these claims were re-examined before the register in charge of the case, pursuant to the terms of Rule 34 of the Supreme Court. In the course of the re-examination it was shown that Goss, Newsom & Co. were pork-packers and commission merchants who made advancements of money for the purchase of hogs that were afterwards packed by them. Usually they entered into articles of agreement with the parties to whom these advancements were made, stipulating for the retention of a lien upon the hogs to secure their reimbursement with interest, and the payment of their charges and commissions. They had such an agreement with Warren B. Roseberry, and, for additional security, he executed to them bills of exchange with William N. Roseberry, as indorser thereon. They had no such agreement with William N. Roseberry, but dealt with him in their capacity of factors. The other facts of the case are stated in the following

OPINION OF THE REGISTER.

As to the claim of Goss, Newsom & Co. against Warren B. Roseberry, they unquestionably had, by virtue of their written agreement with him, a lien upon the product of his hogs for

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charges and advancements made by them to him. They had the right, upon his failure to pay or renew the bills that were given for these advancements, etc., to sell this product and apply the proceeds of the sale on his indebtedness to them. It makes no difference that when they made the sale they had reasonable cause to believe that he was on the eve of bankruptcy. The lien already existed; it was created under circumstances that entitle it to the protection of the Bankrupt Law; it was a security taken upon the making of a loan. (Sec. 5128, Rev. Stat. U. S.) Unless it were made to appear that there was some actual fraud in the sale, by means of which the property was sacrificed, the court in bankruptcy would not interfere with it. On the contrary, it is shown by the testimony in this case that the property was sold for the full market price. Their claim against Warren B. Roseberry is therefore properly credited with the proceeds of the sale of his product.

But this claim is also credited with the sum of three hundred and twelve dollars and thirty cents, which is a balance due William N. Roseberry on an account between them and him, and which, it is claimed, was transferred to their account with Warren B. Roseberry, in accordance with the terms of a verbal agreement with William N. Roseberry, who was, at the time, liable to them as an indorser of Warren B. Roseberry's paper. This agreement is denied by William N. Roseberry, and I do not think it is made out by the evidence. This sum was really due William N. Roseberry, on the commencement of these proceedings, and ought to be recovered by his assignee in bankruptcy. The credit of three hundred and twelve dollars and thirty cents ought, therefore, to be erased from their claim against Warren B. Roseberry, and their said claim increased in this sum.

Interest is due upon this claim until the filing of the petition in bankruptcy only, and a reduction of — dollars ought to be made on account of an overcharge of this amount by way of interest.

As to their claim against William N. Roseberry, they had no written or other express agreement with him, and made no ad-

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vancements to him for the purchase of hogs, as they did in the case of Warren B. Roseberry. But in their capacity of pork-packers they received from him a consignment of hogs which they were to pack in accordance with the custom of their house, and the general usage of pork-houses, with which the bankrupt testifies he was well acquainted. They were to pack and sell them for him, and, as factors, independently of any positive agreement between them, they had a lien on the product for their charges and advancements. (Story on Agency, Sections 376, 377, 378.) While the product was lying in their warehouse the bankrupt gave orders on them for two thousand and ninety dollars in favor of a third party, which they paid, and it is fair to presume that, in giving the order and in paying it, the expectation of both parties was that the product was to be held as security therefor. There were no restrictions upon the claimants as to the time of sale, and, as in the case of their claim against Warren B. Roseberry, it really is unaffected by the fact that it was made when they had reason to believe that bankruptcy was imminent. They had a lien that would have been protected in bankruptcy, and the sale being free from fraud, and the bankrupt being credited upon their account with him with the full value and market price of the property, the sale will not be disturbed by the Bankrupt Court.

After applying the proceeds of the sale of this product of William N. Roseberry to the payment of their charges and advancements to him, there remained a balance of three hundred and twelve dollars and thirty cents, which they transferred to the account with Warren B. Roseberry, and credited him with it. This, as already stated, they had no right to do. It belonged to William N. Roseberry, and ought to be paid to his assignee.

Respectfully submitted,

NOBLE O. BUTLER,

Register in Bankruptcy.

GRESHAM, J.—Register's finding approved, and order accordingly.

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SUPREME COURT OF MISSISSIPPI

OCTOBER TERM, 1876.

In Mississippi a judgment against the sureties on an appeal bond follows upon rendition of a judgment against the principal.

Where sureties upon an appeal bond are discharged in bankruptcy pending such appeal, they must plead such discharge before judgment on the appeal, if they desire to avail themselves of it as a defence.

T. N. JONES et al. v. J. E. COKER et al.

J. E. COKER recovered a judgment before a justice of the peace against R. Y. Coker, who appealed to the Circuit Court, and on the fourth day of November, 1873, gave his appeal bond, with T. N. Jones and H. E. Glasscock as sureties. On the thirtieth day of September, 1875, the case was tried in the Circuit Court, and judgment rendered against R. Y. Coker and the sureties on his bond. Execution was issued on the judgment in the Circuit Court, and on the tenth day of March, 1876, T. N. Jones and H. E. Glasscock filed their bill in chancery to enjoin the enforcement of said judgment as against them. The bill alleged that the judgment was void as to the complainants, for the reason that, on the twenty-eighth day of December, 1874, and during the pendency of the action in the Circuit Court, the complainants were discharged in bankruptcy from all their previous debts and obligations; and that they could not plead such discharge to the action in the Circuit Court, because they were not parties to said action, being only the sureties on the appeal bond of R. Y. Coker, the defendant in the action. Upon a motion made by the defendants in chancery the temporary injunction was dissolved, and at the same time a demurrer to the bill was sustained, and the bill dismissed. The complainants appealed to this court, and assign for error the action of the court below in dissolving the injunction and dismissing the bill.

J. W. Jenkins, for the appellants.

1. It is conceded that, as a rule, a bankrupt must plead his

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discharge, in order to avail himself of its protection. But did the appellants stand before the Circuit Court in such an attitude that they could have availed themselves of their discharge and have prevented judgment from going against them? Could they have put in a plea of any kind whatever? There was no issue between them and J. E. Coker. He was not suing them. They owed him nothing. It was not possible for them to plead their discharge before the judgment was obtained against R. Y. Coker, because until then J. E. Coker did not endeavor to recover against them; and, after judgment was rendered against R. Y. Coker, there was no opportunity for his sureties to interpose a plea in bar of recovery against them, for judgment against them followed instantly, and as a legal consequence of judgment against their principal.

2. The judgment against the principal in the appeal bond is good, but is bad as against the sureties (appellants), who became bankrupts, and were discharged pending the appeal. An execution issued upon the judgment is also good as against the principal, but bad as against the sureties. Now, we cannot in law supersede the execution as to the sureties, without also superseding it as to the principal; for an execution, being an entire thing, cannot, in law, be superseded in part. (*Skinner v. Jayne*, 24 Miss., 567.) It is therefore impossible for the sureties to obtain relief in a court of law. Where defence to an action at law cannot be made, equity will relieve against the judgment. (*Willis v. Ives*, 1 S. & M., 307.) A court of chancery only has jurisdiction, or can give relief to the appellants.

3. It was error in the court to sustain the defendant's demurrer, and dismiss the bill at the same term at which it dissolved the injunction. (*Drane v. Winter*, 41 Miss., 517; Rev. Code, 1871, Section 1048.)

R. C. Smith, for the appellee.

1. Bankruptcy of a defendant or plaintiff is a personal privilege, and must be pleaded, or in some way brought to the judicial knowledge of the court, and in default thereof it cannot

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afterwards be invoked to relieve the party from a judgment recovered against him. (U. S. Dig., 1874, p. 147, plac. 698, 705; *Jenks v. Opp*, 12 N. B. R., 19, 43 Ind., 108; *Park v. Casey*, 35 Texas, 536; 4 U. S. Dig., p. 124, plac. 152; 3 U. S. Dig., p. 109, plac. 73.)

The Bankrupt Act, Section 34, requires the party to plead bankruptcy and discharge.

2. Nothing which a party could have used in a court of law will be ground for injunction. (*Montgomery v. Griffin*, Walker (Miss.), 453; *Puckett v. McDonald*, 6 How. (Miss.), 269; *Nevitt v. Gillespie*, 1 How. (Miss.), 108; *Green v. Robinson*, 5 How. (Miss.), 80; *McRaven v. Forbes*, 6 How. (Miss.), 569; *Yeizer v. Burke*, 3 S. & M., 439; *Nevit v. Hamer*, 5 S. & M., 145.)

3. Under the Revised Code, 1871, Section 1334, if the defendant in the Justice's Court be the appellant in the Circuit Court, and a judgment be rendered in the Circuit Court for the plaintiff in the original suit, the judgment shall also be rendered against the sureties as well as the principal. This is all that was done in this case. The sureties were as much in court as the principal, and the judgment rendered against them is good under the statute. (*Wright v. Simmons*, 1 S. & M., 389.)

CAMPBELL, J.—Sureties on an appeal bond, executed in an appeal from the judgment of a justice of the peace to the Circuit Court, were discharged in bankruptcy, after they executed the appeal bond and before the trial in the Circuit Court, which resulted in a recovery against the principal obligor who was the defendant in the Justice's Court. A judgment was entered in the Circuit Court against the principal and his sureties jointly, and *fiery facias* issued on this judgment, and was levied on certain chattels of the sureties, who exhibited their bill in chancery to enjoin the execution on the ground that the judgment was void, because rendered against them on a debt from which they were discharged by bankruptcy, and because they had no opportunity to plead this discharge before judgment on the bond against them. The

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injunction was dissolved on motion upon the face of the bill, and afterwards, at the same term of the Chancery Court, a demurrer to the bill was sustained, and it was dismissed. Hence an appeal. It was not erroneous to dispose of the demurrer merely because the injunction had been dissolved at the same term. Sustaining the demurrer disposed of the bill; and it was not erroneous to dismiss the bill (there being no application for leave to amend it), if the demurrer was well taken. If the judgment against the complainants is absolutely void, their remedy was complete at law; and chancery had no right to enjoin the sale of chattels in the absence of any special ground for equitable interposition. (*Beatty v. Smith*, 2 S. & M., 567; *Boone v. Poindexter*, 12 S. & M., 640.) But the judgment was not void, because it was against obligors who had been discharged as bankrupts. A discharged bankrupt waives his defense as such by not pleading it. (*Marsh v. Mandeville*, 28 Miss., 122.) If it be true, as a legal proposition, that the complainants could not interpose the defense of bankruptcy, and claim its protection as a shield against the judgment being rendered against them, because of the legal impossibility of doing so, a Chancery Court could relieve them, if their discharge in bankruptcy discharged them from liability on the appeal bond. But it is not true that the complainants could not interpose their discharge in bankruptcy as an objection to judgment being rendered against them as well as their principal in the bond.

By executing the appeal bond they became parties to the suit, at least so far as to entitle them to be heard for their own protection. It was their right to object to the rendition of a judgment against them on the bond because of their discharge from it by matter *ex post facto*. They should have been present at the trial, *actually*, in person, or by attorney, as they were *constructively*, to object to the judgment against them, and to show why it should not be rendered. It is true that judgment against all the obligors in the appeal bond followed a recovery by the plaintiff against the principal, who appealed, according to the provisions of the statute, but that was because

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there was no sufficient legal objection interposed. If the sureties had a release or discharge from the bond which had inured to them after the execution of the bond and before judgment on it, they had the right, and it was their duty, if they desired to avail of it to prevent judgment on the bond against them, to have set up this defense in the Circuit Court before judgment, when an issue of law or fact would have been made up and tried. Not having availed themselves of their right to object to judgment against them on the bond, they cannot be heard in chancery to complain of the judgment. (*Thomas v. Phillips*, 4 S. & M., 358.) Every one against whom a judgment is proposed to be rendered has the right to be heard in opposition to it. If the case be such that a judgment against all the obligors in a bond is declared by law to follow a verdict or judgment against the principal, the bond is the instrument subjecting sureties to liability to such judgment, and anything which discharges from the bond, and is availed of by being set up as a defense, bars a judgment against him who has been so discharged. This view renders it needless to consider whether their discharge in bankruptcy would have been available against the judgment on the bond.

Decree affirmed.

SUPREME JUDICIAL COURT—MASSACHUSETTS.

Where the holder of accommodation paper, knowing it to be such, enters into and signs a resolution of composition in proceedings in bankruptcy instituted against the indorsers, the maker is not thereby discharged from his liability.

WILLIAM H. GUILD v. ALFORD BUTLER.

ACTION upon two promissory notes made by defendant to the order of the firm of Robert W. Dresser & Co., and by them indorsed to plaintiff. Answer, general denial. The defendant made affidavit that he made the notes in question, and

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delivered them to Robert W. Dresser & Co., payable four months after date, to the order of R. W. Dresser & Co.; that he gave said notes without consideration, and for the accommodation of R. W. Dresser & Co., and at the same time received from them a promise in writing to pay the sum at maturity; that said Dresser died, and until his death he had no knowledge or information in regard to the use of said notes; but since said Dresser's death he was informed by the surviving partner that the notes had been given to the plaintiff, Guild, as collateral for the note of said Dresser & Co., and that the same were held by said Guild; that an involuntary petition in bankruptcy against said surviving partner was filed, and that said Guild joined in the petition, his claim being set forth, and no mention made of his holding collateral security; that a composition meeting was held, at which said Guild voted in favor of a resolution of composition proposed by said surviving partner of Dresser, and subsequently signed said resolution.

Upon the trial it was proved by the defendant that the notes were accommodation notes, but that said Guild did not know they were accommodation notes at the time he took them. There was no controversy as to either of these facts; but there was evidence offered by the defendant, and objected to by the plaintiff, and admitted by the court, tending to show the following facts, viz.: That some time subsequent to the commencement of this action, the plaintiff united with other creditors in a petition in bankruptcy against the surviving partner of R. W. Dresser & Co. The court charged the jury, that if they should find the notes in suit were accommodation notes, and the defendant, as between himself and Dresser & Co., was but a surety, and that the plaintiff knew, when he entered into the resolution of bankruptcy, that they were accommodation notes, the fact of said plaintiff entering into said resolution of composition would constitute a defence in said action.

To this ruling the plaintiff excepted.

A verdict was found for defendant.

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GRAY, J.—By the existing acts of Congress upon the subject of bankruptcy, a bankrupt estate may be settled, and the bankrupt discharged in either of three ways :

First, The estate may be administered in the ordinary manner by assignees appointed for this purpose, and a certificate of discharge be granted by the court, with the assent in some cases of a certain proportion of the creditors who have proved their claims. Any person liable as surety for the bankrupt may, upon paying the debt, even after the commencement of proceedings in bankruptcy, prove the debt, or stand in the place of the creditor if he has proved it; or the debt not having been paid by him, nor proved by the creditor, may prove it in the name of the creditor or otherwise. (U. S. Rev. Sts., Section 5070; *Mace v. Wells*, 7 How., 272; *Hunt v. Taylor*, 4 N. B. R., 683, 108 Mass., 508.) But the surety's liability to the creditor is not affected by any certificate of discharge granted to the principal. (U. S. Rev. Stats., Section 5118; *Flagg v. Tyler*, 6 Mass., 33.)

Second, The estate may be wound up and settled by trustees nominated by the creditors upon a resolution passed at a meeting for the purpose by three-fourths in value of the creditors, whose claims have been proved and confirmed by the court, and upon the signing and filing by such proportion of the creditors of a consent that the estate shall be so settled, in which case such consent and the proceedings under it bind all creditors whose debts are provable, even if they have not signed the consent nor proved their debts. The trustees have the rights and powers of assignees; the winding up and settlement are deemed proceedings in bankruptcy; the court may summon and examine on oath the bankrupt and other persons, and compel the production of books and papers, and the bankrupt may obtain a certificate of discharge in the usual manner. (U. S. Rev. Sts., Section 5103.)

Third, The creditors, at a meeting ordered by the court, either before or after an adjudication in bankruptcy, may resolve that a composition proposed by the creditor shall be accepted in satisfaction of the debts due them from him. Such

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resolution, to be operative, must be passed by a majority in number of the creditors whose debts exceed fifty dollars in value, and by a majority in value of all the creditors, and must be confirmed by the signature of the debtor and of two-thirds in number and one-half in value of all his creditors. The debtor is required to attend at the meeting to answer inquiries and to produce a statement of his assets and debts, and of the names and addresses of his creditors. The resolution, with this statement, is to be presented to the court; and if the court, after notice and hearing, is satisfied that the resolution has been duly passed and is for the best interest of all concerned, the resolution is to be recorded and the statement filed, and the provisions of the composition shall be binding on all creditors whose debts, names, and addresses are shown on the statement, and may be enforced by the court on motion and reasonable notice, and regulated by rule of the court, or may be set aside by the court for any sufficient cause, and proceedings in bankruptcy had according to law. (U. S. Sts., 1874, Section 17.) This section, providing for a composition under the supervision of the court, is taken from and substantially follows Section 126 of the English Bankruptcy Act of 1869, St. 32 and 33 C., 71. (See 2 Lowell, 393 and 404.) It has been determined in England, by decision of high authority and upon most satisfactory reasons, that a creditor, by participating in either of the three forms of proceedings, whether by assenting to a certificate of discharge, or by consenting to a resolution either for a winding up through trustees, or for the acceptance of a composition proposed by the debtor, does not release or affect the liability of a surety. (*Browne v. Carr*, 2 Russ., 600; 5 Moore & Payne, 497, and 7 Bing., 508; *Megrath v. Gray*, L. R., 9 C. P. 216; *Ellis v. Wilmot*, L. R., 10 Ex., 10; *Ex parte Jacobs*, L. R., 10 Ch., 211, overruling *Wilson v. Lloyd*, L. R., 16 Eq., 60, cited by the defendant's counsel.) The proceedings for a composition under the statute depending for their validity and operation, not upon the act of the particular creditor, but upon the resolution passed by the requisite majority of all the creditors, binding alike on those who do and those who do not

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concur therein (if the debts are included in the statement filed by the debtor), and finally confirmed and established by the court, upon a consideration of the general benefit of all concerned, differs wholly in nature and effect from a voluntary composition deed, which binds only those who execute it. (*Oakeley v. Pasheller*, 4 Clark & Fin., 207, 10 Bligh N., 548; *Bailey v. Edwards*, 4 B. & S., 761; *Bateson v. Gosling*, L. R., 7 C. P. 9; *Cragoe v. Jones*, L. R., 8 Ex., 81; *Gifford v. Allen*, 3 Met., 255; *Phœnix Cotton Manufacturing Co. v. Fuller*, 3 Allen, 441.)

Assuming, therefore, that this defendant, having signed the note for the accommodation of the indorsers, was to be considered as a surety for them, and that the plaintiff, after acquiring knowledge of that fact, stood as if he had known it when he took the note, yet no defence is shown to this action.

Exceptions sustained.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

AUGUST 21, 1877.

Payments to judgment creditors who have secured their liens by execution levies are not to be deducted from the gross amount realized by the assignee before ascertaining whether there is the requisite per cent. of assets to entitle a voluntary bankrupt to a discharge.

The term assets includes all property of every kind and nature, chargeable with the debts of the bankrupt, that come into the hands of and under the control of the assignee; and the value thereof is not to be considered a less sum than that actually realized out of said property, and received by the assignee for it.

In re GEORGE H. TAGGERT.

GEORGE H. TAGGERT, the bankrupt, has petitioned for his discharge, and none of his creditors appeared in opposition thereto, upon the day to show cause, January 30, 1877.

The number of creditors who proved and filed debts against the estate of the said bankrupt, and who were duly notified by the clerk of the hearing on said 30th day of January, 1877,

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was eighteen ; though, prior to the dividend, in said matter, one other creditor duly proved and filed his debt, in the sum of two hundred and ninety-four dollars and eighty-six cents, and the computation here made includes said debt and creditor.

The bankrupt resides in the town of Lawrence, in St. Lawrence County, in the northern district of New York.

No assent of creditors to the discharge of the said bankrupt had been filed herein, on said day to show cause.

Since that time, the assent of three of said eighteen creditors has been filed with the register, which three creditors represent, in value, one-third of the indebtedness of the said bankrupt, but not one-fourth in number of his creditors ; and the right of the said bankrupt to receive his certificate of discharge depends upon whether there is a sufficiency of assets to entitle him to such certificate.

The whole sum of money actually received by the assignee herein was the sum of four thousand two hundred and forty-three dollars and eighty-seven cents ; and the total amount of debts proved amounted, on the 21st day of December, 1876, the day of adjudication, to the sum of six thousand nine hundred and thirty dollars and twenty-five cents, thirty per cent. of which is two thousand and seventy-nine dollars and seven cents.

The assignee herein paid out the said four thousand two hundred and forty-three dollars and eighty-seven cents so received by him as aforesaid, in the manner following :

Upon order of the court herein, to satisfy and pay the debts of certain judgment creditors, who had sued the said bankrupt, perfected judgment, issued executions, and levied upon his personal property before the petition in bankruptcy herein was filed.....	\$2,737 39
His commissions and disbursements were.....	606 74
He paid to the said nineteen creditors upon a dividend of \$0.12972 +.....	899 74
Making the said.....	\$4,243 87

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That there was a sufficiency of assets to entitle him to a discharge—the requisite thirty per cent.—there can be no doubt, if, in the computation to ascertain what the per cent. of assets was, we are to treat and consider all the moneys realized out of the property of the said bankruptcy estate, real and personal, and received by the assignee, as assets.

Thirty per cent. of the debts proved, and thirty per cent. of the debts, costs, etc., paid by the assignee, upon order of the court, as above stated, amounts to two thousand nine hundred dollars and twenty-eight cents, which is one thousand three hundred and forty-two dollars and eighty-nine cents less than the sum actually realized out of the said estate, and received by the assignee.

Had the judgment creditors not been more diligent in collecting and securing their debts than the other creditors, but, instead, had proved their debts as the other creditors did, and the entire receipts of the assignee, less his commissions and disbursements, been distributed and paid to all the creditors *pro rata*, they would have, each and all, actually received and been paid a dividend of over thirty-eight per cent.

The entire indebtedness was nine thousand six hundred and sixty-seven dollars and sixty-four cents, and the assets actually received by the assignee amount to forty-three per cent., and over, of such indebtedness.

As the law now is, by virtue of diverse decisions of the courts, the levies made upon the property of the bankrupt, by the proper officer, by virtue of executions, duly issued, were no doubt liens upon his estate, and therefore the debts of said judgment creditors become secured debts; and the question here arises, should the secured debts be paid, and the amount of the payment thereof be deducted from the gross amount received by the assignee, before the amount of assets to be compared with the thirty per cent. of the indebtedness proved can be ascertained?

I find no decision in point, upon the question made, since the amendment of the Bankrupt Act of June 22, 1874; but there are several cases reported prior to that date, when the

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law was that the assets of the bankrupt must be equal to *fifty per cent.*, instead of thirty per cent., as the law now is.

In re Kahley et al. (6 N. B. R., 189), on page 193, defines or explains the term "assets," not to express the "net balance to be divided among the creditors, but to mean the entire estate of the bankrupt irrespective of the use to which it may be appropriated by the court."

In re G. & I. I. Van Riper (6 N. B. R., 573), "Held, that the word assets must be considered to mean money received by the assignee;" and in this case there was an insufficiency of assets to grant a discharge because the assignee did not realize out of and receive for the property of the bankruptcy estate the sufficient amount.

In re Vinton (7 N. B. R., 138) is an authority much at variance with the above two cases cited; but the doctrine there laid down would do injustice to the bankrupt, Taggert, in this case, and in my opinion does not accord with the spirit and intent of the Bankrupt Act, and its several amendments.

In re Lincoln & Cherry (7 N. B. R., 334), seems to be a case more analogous to the present one of Taggert, bankrupt, than any that I have found.

In this case, the total amount realized out of the bankruptcy estate was not a sum equal to the requisite fifty per cent.; but, upon the hearing, upon the order of reference before the register in charge, proof of the value of the property of the said bankrupts, at the time of their failure, was made, showing that the value thereof then was more than the requisite per cent.; and the opinion of the register, as expressed in this case, was that when the bankrupt had acted in good faith, and performed his duty under the Bankrupt Law, that he should have his certificate of discharge, if, at the time he filed his petition in bankruptcy, he was possessed of property fairly worth the requisite per cent. of his indebtedness upon which he was liable as principal debtor; and in this case the property sold for, and much less was realized from its sale, than the requisite per cent.

The law of 1874 relating to the question under consider-

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ation reads as follows: "And in case of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the demands proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value."

I do not think that the term "assets" in the law of 1874, has a different or other meaning than it had at the time the decisions cited were made; and in my opinion, to give it a practical and common-sense definition, it means all the property, of every name, kind and nature, *chargeable* with the *debts of the bankrupt*, that come into the hands of, and under the control of the assignee in bankruptcy, by reason of the said property having ever been owned by, and in the possession of the said bankrupt; and the value thereof, or the amount thereof, ought to be considered a sum *not less* than the sum actually realized out of said property, and received by the assignee for it.

And, in the course of events, after the filing of the petition in bankruptcy, many things might occur to deteriorate the value of the property, or destroy it, before it could be converted into money, so that the spirit and intent of the Bankrupt Act, as amended, would not be carried out; and great injustice might be done to the bankrupt, if the amount of assets be confined to and estimated to be the sum actually realized and received, as the case above cited (*In re Lincoln & Cherry*) plainly illustrates.

In the case of Taggert, bankrupt, before me, to estimate the amount of *his* assets to be the amount of money actually realized and received by the assignee for the property which came into his hands as such assignee, would, in my opinion, be but simple justice to the bankrupt, there being no evidence that the said property was worth any more.

Upon the consideration of the interpretation of the meaning of the term "assets," in the Bankrupt Act, as explained and defined in the cases cited; and the further consideration that the amount of moneys realized out of the property which came

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into the hands of the assignee, as such, and actually realized by him, was more than thirty per cent. of his entire indebtedness, which was proved and paid upon the orders of the court, as above stated; and also the further consideration that the bankrupt has, for aught that I know, acted in good faith, and performed his duty under the act, and its amendments. I am of the opinion that he should have his certificate of discharge.

And therefore I make the accompanying certificate of conformity, and recommend that George H. Taggart, the said bankrupt, be discharged as the law provides.

CHAS. N. BIXBY,
Register.

[Judge WALLACE granted a discharge on the 18th of September, 1877, but wrote no opinion.—ED.]

SUPREME COURT—MISSISSIPPI

Where a deed of trust, given to secure a debt, contains a provision that, on the failure of the trustee to act, the *cestuis que trust* may appoint a new one in his stead, the power thereby conveyed is a personal trust or confidence in the *cestuis que trust*, and will not pass to their assignees in bankruptcy.

HUGH CLARK and Wife v. D. K. WILSON et al.

A. M. Harlow and *W. L. Nugent*, for the appellants, cited *Hill on Trustees*, 184, 281, 290; *Perry on Trusts*, Sections 288, 294; *Guion v. Pickett* (42 Miss., 77); 1 *Sugden on Powers*, 145; 4 *Kent*, 345, 348, 349, 351; *How v. Whitfield* (1 Vent., 338); *Adams v. Paynter* (14 L. J. [N. S.] Ch., 54); 1 *Coll. Ch.*, 532; *Walker v. Brungard* (13 S. & M., 723); *Code (Miss.)*, Sections 2302, 2897; *Bump's Bky.*, 554; *In re Williams* (2 N. B. R., 229.)

Hemingway & Harris and *Harris & George*, for the appellees, cited *Bradley v. Chester Valley Railroad* (36 Pa. St., 141); *Wilson v. Troup* (2 Cowen, 195); *Sargent v. Howe* (21 Ill., 148); *Hannah v. Conington* (18 Ark., 106); *Newman v.*

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Samuels (17 Iowa, 528); *Woodruff v. Robb* (19 Ohio, 212); *Coe v. McBrown* (22 Ind., 252).

SIMRALL, J.—In 1873 Hugh Clark and wife made a deed conveying a tract of land, personal effects, etc., to W. W. Mangum, in trust to take possession of the property, and sell it on default made by Clark in the payment of his indebtedness to Harrison & McLaren, merchants at Yazoo City. Some time after this, Harrison & McLaren became insolvent and were adjudicated to be bankrupts. In conformity to the provisions of the Bankrupt Law, John T. Jennings and W. M. Ingram were appointed trustees.

In March, 1874, these trustees, by an instrument of writing, appointed John Thompson in the place of Mangum, to execute the trusts declared in the deed of Clark and wife. On the 20th of March, 1874, Thompson, after posting notice of the sale on the door of the court-house five days anterior to the sale, sold the tract of land described in the trust deed to D. K. Wilson for seven hundred and twenty-five dollars, and executed to him a deed. After his purchase, Wilson instituted the special proceeding given in the "Act in relation to unlawful and forcible entry and unlawful detainer," to recover the possession from Clark. Clark enjoined that suit for sundry reasons:—1. Because he positively refused to include his land in the trust deed; did not knowingly and understandingly sign such deed, or authorize any person to do so for him.

2. Because he does not believe that he is indebted to Harrison & McLaren.

3. Because the trustees of the bankrupts had no authority to substitute a trustee in the place of Mangum.

The first question in logical order is as to the power of the trustees of the bankrupts' estate to appoint a trustee instead of the one named in the deed. The clause in Clark's deed is as follows: "Should said second party (Mangum) fail from any cause to act herein, then said third parties (the *cestuis que trust*) may appoint, in writing, any one else to execute this trust, with every power, title, and right, as well as duty, touching the

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same." The proposition advanced by the counsel for the appellants is that the power conferred on the *cestuis que trust* is personal and confidential, and did not pass by the conveyance of their property and estate as bankrupts to Jennings and Ingram, trustees.

For the appellees, it is contended that the power was incident to the interest of the *cestui que trust*, and would accompany the transfer of that interest and vest in the assignee; and, whether that be true or not, by virtue of the Bankrupt Law the conveyance therein contemplated from the bankrupts to the trustees carried the power and vested it in them. It was competent for the grantor, Clark, to confer such power on the trustee as he chose, provided he did not violate the law, and to grant such privileges and rights to his creditors, the *cestuis que trust*, as he might elect. The deed is the source and the limit of the powers, duties, and rights of the trustee and *cestuis que trust*.

There is no inherent right in the creditor who is secured by a deed in trust to appoint a trustee in the event of death, resignation, or refusal to act. It is because express authority is conferred on the *cestui que trust* "to name another trustee" that such power can be exerted. Since all the powers are raised by the grantor, his will, as expressed in the deed, is the measure of their extent. If the trustee is authorized to sell, the terms, the time, and the manner as prescribed must be pursued. If the trustee dies, becomes unable, or declines to sell, and no provision is made for a successor, the vacancy can only be filled by the Chancery Court, which never permits the trust to fail because the appointee of the grantor cannot, or will not, execute it. The law does not supply the *cestui que trust* with such power. He does not have it, unless he stipulates for it with the grantor. Nor can those who take by succession from him, as the executor or administrator, make an appointment, unless they are expressly authorized by the grantor to do so. (Hill on Trustees, 183; 1 Sugden on Powers, 145; *Bradford v. Belfield*, 2 Sim., 264.) When the power is granted, it should designate the person by whom, as well as the event or circum-

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stances upon which it may be exerted. If a person not named, or distinctly described by his office or character, makes the appointment, or if the circumstances do not warrant the new appointment, or there be serious irregularity in executing the power, in all these cases the acts done by the appointee will be invalid, and the original trustee will not be exonerated or discharged. (Hill on Trustees, 189 ; *Guion v. Pickett*, 42 Miss., 77.)

“Where a party takes under execution, he takes under authority of the power equally as if the power, and the instrument executing the power, had been incorporated in one instrument.” (Litt., Section 169 ; Co. Litt., 113a ; *Marlborough v. Godolphin*, 2 Ves., 61, 78 ; *Doolittle v. Lewis*, 7 Johns. Ch., 45.)

It is claimed by counsel for the appellees that these principles do not apply in this case, because the power is appendant to the estate, and not personal, or, as it is termed, “in gross.” A power is annexed to the estate when the donee has an estate in the land, and the estate to be created by the power is to, or may, take effect in possession, during the continuance of the estate to which it is annexed, as the power to a tenant for life in possession to make leases. A power in gross is where a person to whom is given an estate, but the estate is not to take effect under the power until after the determination of the estate to which it relates. (Co. Litt., 298, note by Hargrave & Butler.) A power to the mortgagee to sell is an example of the former kind ; being annexed to the estate, it is not personal, or in gross, and would not terminate at the death of the mortgagor. (1 Caines’ Cases in Error, 15.) No power is conferred on the assignees of Harrison & McLaren to appoint a trustee. No estate in the land is granted to them. Nor could they by deed raise an estate and transfer it to a purchaser. We mean a distinct estate. They could only assign their interest in the land by an assignment of the debt. The security created by the deed of trust inseparably attends the debt as an appendage to it. An assignment of the principal thing carries with it the security as an appendage. There can be no transfer or assignment, by deed or otherwise, of an estate in the land separate

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from and independent of the debt. These remarks are applicable alike to deeds of trust and mortgages. They are essentially the same security, differing only in the form.

It has come to be almost the universal doctrine that the mortgagor, or grantor in the deed of trust, is the real owner of the land, and that it is transmissible from him by deed, descent, or devise; and that the interest of the mortgagee is only regarded as real estate so far as the legal title, after condition broken, may be necessary to give him the benefit of his security. (*Strickland v. Kirk*, 51 Miss., 795.)

The mortgage, or deed in trust, is a burden or charge on the land. It would follow, as a corollary from the principle, that the mortgagee, or *cestui que trust*, has no interest or estate in the land, except a charge or burden upon it as a security; and that neither can transmit that to another except he passes also the debt. In *Jackson v. Bronson* (19 Johns., 325), it was ruled that there could be no assignment of the mortgagee's interest in the land without an assignment of the debt. Nor is his interest the subject of attachment or sale under execution. (*Hutchins v. King*, 1 Wall., 53; *Southerin v. Mendum*, 5 N. H., 420; *Strickland v. Kirk*, *ubi supra*.) The interest of the mortgagee is a chattel, and is devolved on the holder of the note passed by delivery or indorsement. But there are differences between the mortgagee and *cestui que trust*, growing out of the structure of the instruments under which their respective rights accrue, important to be noted in considering this question. The points of agreement are, that both are creditors and have securities for their debts.

But the mortgagee, after condition broken, becomes owner of the estate, is invested with the legal title, and may, at law, have a certain redress predicated of his legal right. But the *cestui que trust* in no contingency takes the title that is outstanding in the trustee, to be dealt with as declared by the grantor, to accomplish the trust dependent on it. Ordinarily, the trust is to sell the land and pay the creditor. In addition to the power of sale, Mangum, in this case, was directed to take possession of the property. It would follow, therefore, that

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a power conferred on the *cestui que trust* cannot, in the nature of things, be a dependency of the title, but must be personal or in gross. It is a confidence reposed in the *cestui que trust*, which he cannot delegate to another, unless thereto authorized by the donor. Our conclusion is that Harrison & McLaren, before their bankruptcy, could not have transferred the debt and the trust security, by deed or otherwise, with all the rights and powers which it conferred on them, so as to have vested in the purchaser from them the power to appoint a new trustee. That right can only be communicated to an assignee of the *cestui que trust*, where the donor has expressly stipulated that the assignee shall also have the power. In that case, any one who becomes the owner and holder of the debt, and the trust security as its incident, is assignee of the power, and would be authorized by the donor to execute it. It remains to consider whether, by operation of the Bankrupt Law, and the conveyance of the bankrupts pursuant to it, the power could or did vest in the trustees. The forty-third section of the Bankrupt Law is to the effect that the bankrupt shall convey, transfer, and deliver all the property and estate of the bankrupt to the trustees, who shall hold the same and with the same powers in all respects as the bankrupt would have held the same, if no proceedings in bankruptcy had been taken.

The purpose of the conveyance is to place the property and estate in the trustees, so that they may be administered for the creditors. It has, therefore, been uniformly held, that unless property or estate is beneficially in the bankrupt, so that it may be applied for the creditors, it does not pass; that property, which may be held by the bankrupt purely in trust for another, does not go to the trustee.

The trustees take property, or rights or interests in or to property, choses in action, etc., precisely as the bankrupt was owner, or had interest in the same, but only such as may be valuable to or made available for creditors.

Whatever interest Harrison & McLaren owned in the debt of Clark, or in the property pledged as security, vested in the trustees. What were they?

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The supposition must not be indulged that the bankrupt law proposes or intends that the bankrupt shall assign more or greater interests or rights of property, or appendages to it, than he had, or than were capable of assignment. If he was a mortgagee, he complies with the law when he delivers up the evidences of indebtedness; if he is *cestui que trust*, or creditor protected by the ordinary trust deed, all that he can transfer to the trustees is the note, or bond. In each instance the securities, as incidents and appendages of the debt, pass also. But if the bankrupts were the donees of a power purely in personal trust and confidence, although in aid of a security, such power, not being in its nature assignable, does not vest in the trustees. If, however, the power had been bestowed on Harrison & McLaren and assigns, the donor, Clark, would then have made it assignable, and it would have been communicated to the trustees by the conveyance of the bankrupts. But because the trustees of the bankrupts' estate could not appoint a trustee in the place of Mangum, it by no means follows that they are without remedy. They have succeeded to all the rights of the bankrupts, to the deed of Clark, and the trust security. If they could not execute the trust through the original trustee, they had a plain and adequate remedy in the Chancery Court, either to have another trustee appointed to make the sale, or to have the trust executed by a foreclosure, decree and sale.

The case of *Sargent v. Howe* (21 Ill., 148), cited by counsel for the appellees, supports these views. There the trustee refused to execute the trust at the instance of the assignee of the notes, who brought his plaint in chancery for relief. The reasoning was to show that the court could afford relief. It was to the effect that the assignment of the notes carried the security, to "the same extent and in the same condition it was held by the payee." In defining with more particularity what these rights were, it was said "that the lien which the payee held in the property passed by the assignment; the assignee succeeded to the equitable rights of the assignor in the trust property to the same extent he held it as a security."

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Therefore, as the court had ample jurisdiction over trusts and trustees, it could compel the recusant trustee to do his duty, or could remove him and appoint another.

Precisely that course was open to the appellees as holders of Clark's indebtedness. They could have complained to the Chancellor that Mangum would not execute the trust, and, by reason of their equitable interest in the trust property, they could have asked that the court would either remove him and appoint a new trustee or, through its own master or commissioner, make sale of the property. The trustees of the bankrupts' estate assumed to exercise a power which they did not have, in appointing trustees in the stead of Mangum. The sale made by the trustees was invalid and ineffectual to pass the trust property to Wilson, the purchaser, who, therefore, had no right to vex Clark with a suit to recover the possession. But there was also controversy between the trustees of the bankrupts' estate and Clark as to the real balance due from him. It is necessary that such balance should be ascertained in order to determine the sum for which the trust property should stand as security. In order to determine that question, and conclude finally the litigation between the parties, the decree will be reversed and cause remanded.

UNITED STATES CIRCUIT COURT—N. D. NEW YORK.

OCTOBER 24, 1877.

An insolvent debtor, who was a trader, gave to a creditor new notes, payable on demand, signed by himself alone, to take up others of the same amount, secured by the signature and indorsement of other responsible parties, and purchased goods of persons who were ignorant of his insolvency, in order that such goods might be taken on execution on judgments recovered on such notes. *Held*, That he thereby procured, or at least suffered his property to be seized on execution within the meaning of Section 5128 of the Revised Statutes, if seizure there was.

Where the agent of the creditor had reasonable cause at the time to believe the debtor was insolvent, and knew that the transaction was in fraud of the Bankrupt Law, it is the same as if the creditor had himself taken part therein, with the same cause to believe and the same knowledge.

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A levy which has been relinquished before the filing of a petition in bankruptcy creates no lien upon the property as against the assignee.

GARDNER A. SAGE, Jr., v. JONATHAN G. WYNKOOP, Assignee, etc., of JOHN H. FOWLER, et al.

THIS was a bill filed to compel the payment of two judgments recovered by the complainant against one John H. Fowler out of a certain fund deposited with the clerk in accordance with a special order of the District Court.

The bill sets forth the recovery by the complainant, in the Supreme Court of the State of New York, of two judgments against said John H. Fowler, one for four thousand and fifty-two dollars and twenty-eight cents, on the 19th day of May, 1875, and the other for one thousand and twenty-three dollars and thirty-five cents on the 2d day of June, 1875; the issue of executions thereupon and the levy by the sheriff of Onondaga County by virtue thereof upon a stock of goods in the city of Syracuse, belonging to said John H. Fowler; that on the 4th day of June, 1875, said John H. Fowler filed a petition in voluntary bankruptcy, and subsequently was adjudged a bankrupt thereupon, and Jonathan G. Wynkoop was appointed assignee; that on the 17th day of August, 1875, an order was made by the District Court authorizing the assignee to sell the stock of goods which had been levied upon by the sheriff and directing him to deposit with the clerk the sum of five thousand two hundred dollars, to which, under the provisions of said order, the liens of the sheriff and the complainant attached with the same force as before the making of the order they had attached to the stock of goods; that shortly thereafter the assignee sold the goods and deposited with the clerk the amount required by said order.

The relief demanded was that said judgments, with interest, sheriff's fees, and costs, be decreed to be paid out of said fund so deposited.

The assignee alone answered, and, after admitting substantially the allegations contained in the bill, alleged that said John H. Fowler was insolvent for more than four months be-

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fore he was adjudged a bankrupt, and that during that period the complainant held four notes of a thousand dollars each, made by one Combes and indorsed by said Fowler and his wife, and which respectively matured March 18th and 31st, April 21st and May 8th, 1875; that at the same time the complainant held a note for one thousand dollars made by said John H. Fowler, without an indorser, maturing April 13th, 1875; that on the 28th of April, 1875, said John H. Fowler retired said notes by giving five new notes for one thousand dollars each, payable on demand, signed by himself and unindorsed, dated respectively as of the dates when the notes of said first series became due; that upon the same day actions were commenced upon four of those notes, and subsequently upon the fifth, which resulted in said two judgments of the complainant; that this was done to cast the burden of paying said notes from responsible parties upon said John H. Fowler, in contemplation of his soon becoming bankrupt; that said judgments were recovered by collusion and with intent to give the complainant preference, and that the filing of the petition in bankruptcy was delayed by said John H. Fowler in order that the preference should be perfected.

Evidence was given which tended to sustain and also to disprove the allegations in the answer.

Irving G. Vann, for the complainant,
George N. Kennedy, for the defendant.

WHEELER, J.—This cause has been heard on bill, answer, replication, proofs, motion of defendant to suppress evidence, and argument of counsel.

The evidence sought to be suppressed, although most of it is in the nature of hearsay, as the motives of those communicating are in question, show parts of the transaction involved, and for that purpose seems to be admissible. The motion is therefore overruled.

From the pleadings and proof it satisfactorily appears that the bankrupt, of whom the defendant is assignee, was insolvent

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and known to be so by himself and by the agent and attorney of the orator having entire control of this business for the orator.

That the bankrupt, who was a trader, by giving new notes signed by himself alone to the attorney of the orator to take up other notes of the same amount, secured by the signature and indorsement of other responsible parties toward whom they were both friendly, on which to be sued, and by procuring goods on credit of parties to whom his insolvency was unknown, in addition to his stock, that they might be taken on execution for this debt, procured, or at least suffered, his property to be seized on execution, if seizure there was, to give relief to those liable for the debt and interested to have it satisfied by him or out of his means. And that the agent and attorney of the orator had good reason to know that the new notes were given, and took them, and caused suit to be commenced upon them, for the like purpose of saving the other parties, or some of them for whom he was interested, harmless, without detriment to his client and principal or to himself, and caused the proceedings to be carried forward, knowing that if the plan should be successful other creditors would probably suffer.

This was done by the bankrupt, being insolvent, with a view to give a preference to a person or persons under a liability for him, and done by the agent of the orator having reasonable cause to believe the bankrupt was insolvent, and knowing that it was in fraud of the provisions of the Bankrupt Law, which is the same as if done by the orator himself, with the same cause to believe and with the same knowledge, and brings the case within both the letter and spirit of Section 5128 Rev. Stat., U. S., as amended by Sections 10 and 11 of the Act of June 23, 1874, pp. 211 and 212.

The orator having brought this suit to reach the avails of property of the bankrupt levied on by virtue of executions on judgments in these suits so brought, is not, on these findings, entitled to any decree in his favor.

There is another ground, not urged in argument, however, on which it would seem that the defendant is entitled to a de-

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cree in his favor, at least so far as the first and larger judgment and execution are concerned.

It is alleged in the bill, fol. 15, that the sheriff, by virtue of that execution, *levied* on the stock of goods of the bankrupt, and fols. 25 and 26, that he kept and retained possession of it. The levy, whatever it was, is admitted in the answer, fol. 108, and as proved before the master, fols. 635-6; but there is no admission or proof about keeping or retaining possession under the levy except the testimony of the deputy-sheriff who served the other execution, fols. 639-47, which shows that possession, if taken, was not kept, nor resumed under that execution until the night of June 3, 1875, and that it was vacant so far as the officer serving that execution, or any officer acting under it was concerned from before 11 o'clock until night of that day, during which time, at 2 o'clock P. M., the petition in bankruptcy of the bankrupt was filed. From the whole it seems most probable that there was a formal levy, as it is called, by going into the store on the 31st of May, but no seizure until the night of the 3d of June. However that was it is clear that any seizure that had been made had been relinquished, and after relinquishment it was the same as if it had never been made. (*Bradley v. Wyndham*, 1 Wils., 44; 2 T. R., 596; *Storm v. Woods*, 11 Johns., 110; *Fitch v. Rogers*, 7 Vt., 403; *Kellogg v. Griffin*, 17 Johns., 274; *Heard v. Fairbanks*, 5 Met., 111; 2 Addison on Torts, Section 907.)

In this view neither the sheriff nor the orator had, at the time the petition in bankruptcy was filed, any greater right to the goods of the bankrupt than so far as they were bound by the common law by the teste of the writ of execution, left in force by the statute after delivery of the writ to the sheriff.

The common law so bound the goods of the debtor that the sheriff might seize them in the hands of a purchaser from the debtor unless bought in market overt, but vested no property in them in the sheriff without seizure. (*Smallcomb v. Cross et al.*, 1 L'd Raym., 251; *Payne v. Drew*, 4 East, 523; *Edwards v. Harben*, 2 T. R., 587; *Beals v. Guernsey*, 8 Johns., 446; *Bliss v. Ball*, 9 Johns., 132; *Westervelt v. Pinckney*, 14 Wend., 123.)

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The whole property in the goods remained in the debtor and passed by the assignment to the assignee. (Rev. Stat. U. S., Section 5044.) This is in accordance with the rule under the English Bankrupt Acts. (*Bayly v. Bunning*, 1 Lev., 173; *Philips v. Thompson*, 2 Lev., 69, 191; Montagu on Liens, 83; *Smallcomb v. Cross*, 1 L'd Raym., 251; *Cole v. Davies*, id., 724.)

The right of the sheriff to seize the goods is quite similar to that of the landlord under the statute of Illinois to seize the goods of his tenant for rent, which is held not to vest any right in the goods against an assignee in bankruptcy. (*Morgan v. Campbell*, 11 N. B. R., 529, 22 Wall., 381.) And it seems to have been on the ground that there was an actual seizure that the right of a landlord to hold the property of his tenant against the assignee has been upheld. (*Marshall v. Knox*, 8 N. B. R., 97, 16 Wall., 551.)

It is not at all clear that the sheriff serving the other execution took and maintained any possession of the goods before the night of June 3d, and, if showing that he did would maintain the orator's bill, it is quite doubtful on the evidence whether it would be made out. But whether it would be or not, he fails here on the other point.

Let a decree be entered that the bill be dismissed with costs.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

Where all the members of one firm are partners in another firm, they cannot prove its debt against the latter.

Where a bank has discounted drafts drawn by the former firm upon one who is a partner with the members of such firm in the latter firm, it cannot prove its claim thereon against the joint estate, but must look to the separate estate of the drawee.

*In re RICHARD SAVAGE, JESSE PECKHAM,
ISAAC M. HOAG and STEPHEN T. PECKHAM.*

WALLACE, J.—Jesse Peckham, Isaac M. Hoag, Stephen T. Peckham and Edwin Stocking were partners in trade, compos-

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ing the firm of Peckham & Hoag, dealers in lumber, at Toronto, Canada. And it appears from the stipulation of the parties that all these persons (except Stocking, who has died), together with one Richard Savage, are the surviving members of the firm of Richard Savage & Co. The latter firm carried on the lumber business at Syracuse, in this State. The proofs show that the firm of Peckham & Hoag shipped lumber at Toronto to the firm of Richard Savage & Co. at Syracuse, and drew their drafts upon Richard Savage individually, on account of the lumber thus shipped. These drafts were discounted by the Canadian Bank of Commerce at Toronto, and the proceeds placed to the credit of Peckham & Hoag. The bank now seeks to prove these drafts or their consideration as money lent and advanced against the joint estate of Richard Savage & Co. The bank is also the assignee of Peckham & Hoag for all demands existing in favor of that firm against the firm of Richard Savage & Co.

The bank cannot recover upon the drafts, because it is well settled that an action upon negotiable paper will only lie against those who are parties to it upon the face of the paper; and the proof does not show that Richard Savage was the firm name of those who composed the firm of R. Savage & Co. It is true that it was agreed between the members of Richard Savage & Co. that these drafts should be drawn on Savage individually, it being understood between them that the bank would probably prefer to have the drafts thus drawn as a matter of form. But the firm were not in form the drawees, and the express object was to obviate such a result, and the case therefore is not one where all the partners become obligated by the use of a firm name which is intended to represent the obligation of all. As between themselves all intended to be bound for the debt, but they did not intend to be bound upon the contract with the bank evidenced by the draft.

The case is similar to that where an agent signed a note made for his principal, not in the name of the principal, but in his own name. If one who discounts the note knows that it is in fact made for the benefit of the principal, he cannot recover of the principal, but must look to the agent.

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If the moneys advanced upon the discount of the drafts had been loaned to the firm of Richard Savage & Co., then the bank could recover upon the original consideration, unless the circumstances show that the bank intended to rely on the individual credit of Richard Savage. There is a conflict in the testimony as to whether or not the bank did intend to rely on Savage individually, and on the whole I incline to the conclusion that the officers of the bank supposed that the firm of Peckham & Hoag, the drawers, and Richard Savage, the drawee, constituted together the firm of Richard Savage & Co., and that the officers of the bank preferred to have the name of Savage individually as the drawee.

The bank must be held to have elected to look to Savage individually, and is therefore precluded from recovering against the firm of Richard Savage & Co. upon the consideration of the drafts as well as upon the paper.

The claim of the bank, if it can be proved at all, must rest on the right of the firm of Peckham & Hoag to prove the claim against the larger firm which has been assigned to the bank.

The difficulty in the way of this proof arises from the fact that the members of Peckham & Hoag were also members of Richard Savage & Co.

An action at law cannot be maintained in such a case, and I have been unable to find any decision sustaining such an action in equity.

When the same person is a partner in two different firms composed of different individuals, one of which firms, being indebted to the other, becomes insolvent, I do not doubt the latter may prove its debt and receive its dividend from the insolvent firm, because in such case an action in equity would be sustained. But when as here all the members of one firm are partners in another firm, quite a different case is presented. The rule has been long settled in bankruptcy that one partner cannot prove his claim against the firm of which he is a member in competition with creditors of the firm, the reason being that as the creditors of the firm are his creditors he would be

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taking from his own creditors what ought first to be applied in payment of their debts. But the English cases do not apply this rule where the partner carries on a distinct trade and the claim is one for articles furnished and not for money or advances. The rule has only been modified for the purpose of the distribution of the assets of the bankrupts as between the creditors of the partner or partners individually and the joint creditors, so that where all the members of a firm are in bankruptcy, and several or all of them have been partners in two distinct firms engaged in a distinct business, the one firm from the other, the two firms are treated as distinct concerns for the purpose of the distribution of their assets among their respective creditors.

If the firm of Peckham & Hoag and the firm of Richard Savage & Co. were both in bankruptcy, so that this court could deal with both estates, there would be no difficulty in the way of distributing the estate conformably to the practice thus established. But the firm of Peckham & Hoag is not here. Certain individual partners in that firm are here as partners of Richard Savage & Co. The assets of Peckham & Hoag are not within the control or jurisdiction of this court. If it should be permitted to those bankrupts who were members of Peckham & Hoag to prove a claim jointly against the estate of Richard Savage & Co., this court would be powerless to control the distribution of the proceeds, and it would be unable to ascertain or recover such sum, if any, as might be due from one member of Peckham & Hoag to the other, and consequently could not apply it to payment of joint debts after payment of the individual debts of the partners.

I am unable to see why, in a case like the present, proof should be permitted except to the extent of the interest which the members of Peckham & Hoag have in the assets of Richard Savage & Co. There is an interest only in the joint assets after the payment of the joint debts.

As there cannot possibly be any surplus in view of the amount of the joint debts, it is useless to attempt to work out the rights of the parties. The claimant must rely on the sepa-

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rate estate of Savage, the drawee of the drafts and the joint estate of Peckham & Hoag, its assignors and the drawers of the drafts.

An order is directed expunging the proof of debt and disallowing the claim.

SUPREME COURT COMMISSION—OHIO.

A discharge cannot be impeached collaterally for fraud in preventing notice to creditors of the pendency of the proceedings, nor on the ground that the bankrupt, before the proceedings in bankruptcy were commenced, fraudulently removed his property out of the jurisdiction of the court in which an action against him was pending, with intent to defraud his creditors.

A judgment against the bankrupt, existing at the time his petition is filed, whether founded upon contract or tort, is a provable debt.

Where it is claimed that the collection of a judgment is not barred by a discharge in bankruptcy on the ground that such judgment is a debt created by fraud, the court will look back of the judgment, and if it had its root and origin in fraud, the discharge will not bar it.

A judgment recovered by a father for the seduction of his daughter, where there was no promise of marriage, and no arts or devices were practised to accomplish such seduction, is not a debt created by fraud within the meaning of the Bankrupt Act.

JOHN B. HOWLAND v. SAMUEL D. CARSON.

The plaintiff below, Samuel D. Carson, brought his action to enjoin the collection of a judgment, stating :

1. That prior to *May* 30, 1868, Howland obtained a judgment against the plaintiff in Adams county, for one thousand dollars and costs, which at that date was a valid debt against him.

2. That on said 30th of May, 1868, plaintiff filed his petition in bankruptcy in the District Court for the Northern District of Illinois, in which district he then resided, and that such proceedings were had thereon that on the 28th of September, A. D. 1869, he received his final discharge under the Bankrupt Law of the United States, whereby he was discharged "from all debts and claims which by said acts are made provable against his estate, and which existed on the 30th of May, 1868, on which day the petition for adjudication in bankruptcy was filed by

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him ; *excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.*"

3. On the 10th of November, 1870, the defendant caused execution to be issued on this judgment, and levied the same on lands of plaintiff in Brown county, which he had acquired *by devise since his discharge in bankruptcy.*

4. That this judgment was not a debt, claim, liability or demand created against him by a *fraud* or *embezzlement* on his part, or by his *defalcation* as a public officer, or while acting in a *fiduciary* capacity, and therefore he was discharged from its payment.

The prayer is for a perpetual injunction.

The answer contains three defences :

1. That the defendant had no notice of the proceedings in bankruptcy, and that such notice was, by the plaintiff's procurement, fraudulently withheld from him.

2. That after the commencement of his action, on which this judgment was rendered, the plaintiff, who was then residing in Adams county, removed his property therefrom and from the Southern District of Ohio, with intent to defraud his creditors, and particularly the defendant.

3. That said judgment was a debt created by the fraud of the plaintiff, within the true intent of the Bankrupt Act, in this, that he wrongfully and fraudulently seduced the defendant's daughter, to his damage, which was the cause of action for which the judgment was rendered.

To these answers there was a general demurrer, which was sustained in the common pleas, and in the district court on appeal, and a perpetual injunction granted.

To reverse these decisions this action is here prosecuted.

White & Waters, for plaintiff in error.

Loudon & Young, for defendants in error.

JOHNSON, J.—In *Smith v. Ramsey* (15 N. B. R., 447, 27 Ohio St., 339), it was held that a discharge in bankruptcy cannot be collaterally impeached on the ground that it was ob-

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tained fraudulently, and that such impeachment can only be had in a direct proceeding in the court granting the discharge.

In *Rayl, Adm'x v. Lapham* (15 N. B. R., 508, 27 Ohio St., 452), it was further held that actual notice to the creditors is not essential to the jurisdiction of the court in a bankrupt proceeding, as the main purpose is to secure a proper distribution of the estate among the creditors, and hence, if the bankrupt wilfully and fraudulently prevents notice to a creditor, it would be good ground for annulling a discharge by a direct proceeding in the bankrupt court where it was granted; yet such discharge could not be collaterally impeached.

These decisions dispose of the first and second defences.

The third defence raises the question, whether this was a debt created by *fraud*?

The section of the Bankrupt Act (U. S. Rev. Stat., sec. 5117) relied on is as follows:

"No debt created by *fraud* or *embezzlement* of the bankrupt, or by his *defalcation*, as a public officer, or while acting in a fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."

This judgment was an existing debt at the time (May 30, 1868) the petition in bankruptcy was filed, and as such was provable in bankruptcy, although the original cause of action sounded in tort for unliquidated damages. (*Ellis v. Ham*, 28 Maine, 385; *Crouch v. Gridley*, 6 Hill, 250; *Kellogg v. Schuyler*, 2 Denio, 73; *Comstock v. Grout*, 17 Vt., 512; *In re Comstock*, 22 Vt., 642.)

If this cause of action had continued a liability for damages, when Carson was adjudicated a bankrupt, it is settled that it was not a debt or claim provable in bankruptcy, nor would the discharge affect an after-acquired judgment thereon.

By section 5067 of the Revised Statutes of the United States, *unliquidated damages*, arising out of any *contract* or *promise*, on account of any goods and chattels wrongfully taken, converted or withheld, as well as *debts* due or to become due, are

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provable; but no provision is made for proving such damages not arising on such contracts.

But a judgment for such damages becomes a debt of record, and may be proved as other debts. (*In matter of Hennocksburch and Block*, 6 Ben., 150; *Morse v. Hutchins*, 102 Mass., 439; *Crafts v. Belden*, 99 Mass., 535.)

The effect of a discharge was, therefore, to release Carson, unless this judgment was a debt created by fraud.

What constitutes fraud as an element of the liability which prevents the discharge under the Bankrupt Act from operating on the debt?

The word *debt* in this act is said to be synonymous with *claim*, and embraces *claims* created by fraud. (*Stokes & Leonard v. Mason*, 12 N. B. R., 498, 10 R. I., 261.)

If we apply the maxim, *noscitur a sociis*, to this section, it is clear that the claim must be one sounding in contract, as it applies to debts created by *fraud*, *embezzlement*, *defalcation*, or breach of trust arising out of a *fiduciary relation*. Debts arising from either of these classes sound in contract, and are founded on contracts express or implied.

A debt created by fraud implies confidence and deception. It implies that it arose out of a contract, express or implied, and that fraudulent practices were employed by the debtor, by which the creditor was defrauded. (*Sturdevant v. Tuttle*, 22 Ohio St., 111; *Reid v. Martin*, 11 Sup. Ct. (N. Y.), 590; 1 Story Eq. Jur., sec. 186; 1 Bouv. Law Dict., title Fraud; *Broadnax v. Bradford & Co.*, 50 Ala., 270; *Lord v. Goddard*, 13 How., 198; *Chandelor v. Lopus*, 1 Smith's Lead. Cas., 238.)

In case of a judgment debt the court will look back, and if it had its root and origin in fraud, the bankrupt's discharge will not bar it, whatever the form of the action. The judgment does not merge the fraud. (*Reid v. Martin*, 11 Sup. Ct. (N. Y.), 590; *Jones' Ex'r v. Clark*, 25 Grattan, 642; *Flanagan v. Cary's Adm'r*, 37 Texas, 67.)

In the case at bar, the father's damages arose from the seduction of his daughter. It is not averred that it was under any promise of marriage, nor that any arts or devices were

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practiced which could in law amount to legal fraud on the father.

On the contrary, it was a pure case of tort, a heinous crime against morals, and in some cases against law, but one which, in the absence of a promise of marriage, under which it was committed, gave the real party injured, the daughter, no cause of action at common law.

The liability of the father rests upon the loss of services incident to the wrong.

It is wholly independent of, and exists without any of the elements of fraud recognized as creating a debt or liability.

A question has been raised which we do not find it necessary to decide, namely, whether all judgments of record are debts provable in bankruptcy, and so discharged by discharge under the Bankrupt Act.

In re Sutherland (8 Am. Law Reg. (new series) 39), it was held that a judgment for a *fine*, imposed as a penalty for a crime, is not a debt, within the meaning of this act, for the reason that such fine was not a *debt*, but a *penalty*, and to allow it to be discharged would in effect allow the national government to grant pardons for crimes committed against the state.

So in *The People v. Spalding* (10 Paige Ch., 284, affirmed in 7 Hill, 301, and in 4 How. (S. C.), 21), it was held that a discharge under the Bankrupt Act of 1841 did not discharge a fine imposed for contempt of court.

These cases rest upon grounds of public policy, because the contrary would involve an interference with the police power of the states to punish crimes, and of the courts to enforce authority and preserve public order, and because individual indebtedness alone is within the scope of the Bankrupt Act. Judgments founded on fines and penalties imposed as a punishment for crime, stand on a different footing than judgments like the one at bar in favor of one person against another.

The judgment of the District Court and Court of Common Pleas is affirmed.

In re Benson.

UNITED STATES DISTRICT COURT—INDIANA.

In Indiana a conveyance of real estate to husband and wife creates an estate in joint tenancy. While such an estate exists neither husband nor wife has any interest which can be sold on execution, or will pass to the assignee of either.

If the effect of a divorce, procured subsequent to an adjudication in bankruptcy, is to destroy the unity of possession and turn the estate into a tenancy in common, it is simply the creation, by operation of law, of a new interest in the bankrupt, and is, to all intents and purposes, a new acquisition which the assignee cannot claim.

Whether a divorce will create such a change in the nature of the estate, *quære*.

In re JAMES BENSON.

GRESHAM, J.—In this case the assignee presents his petition for an order to sell the interest of the bankrupt in certain real estate. On behalf of the bankrupt this application is resisted. The facts are not matter of dispute, and are substantially as follows: The real estate in question is situate in this district. The adjudication of bankruptcy was made March 29, 1877. The estate is largely indebted and there are no assets, unless this real estate is assets. March 4, 1870, one Kirkpatrick conveyed to the bankrupt and his wife, Margaret, the land in question, to be held in entirety. In August, 1877, the Perry Circuit Court decreed a divorce to Margaret Benson. No discharge has been granted to the bankrupt.

Counsel for the assignee insist that, at the date of the adjudication, the bankrupt had an interest in said real estate, which was subject to levy and sale upon execution; that this interest passed to the assignee by virtue of the deed of assignment; and that the decree of divorce made Benson and his wife tenants in common, the effect of destroying the marital relation being to sever the estate in entirety.

On the other hand, it is urged by counsel for the bankrupt, that, at the time of the adjudication, the husband had no such interest in the land as could have been seized and sold upon execution against him; that consequently no estate in it is passed to the assignee; and that if, by a subsequent divorce,

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any new or different holding was created by reason of the changed relation of the tenants, that was the creation of an interest acquired after bankruptcy, and so vests in the bankrupt, unaffected by his deed of assignment.

The statute of Indiana on the subject (1 G. & H., Secs. 7 and 8, p. 259) reads as follows:

"Sec. 7. All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy, and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy.

"Sec. 8. The preceding section shall not apply to mortgages nor to conveyances in trust, nor when made to husband and wife; and every estate vested in executors or trustees, as such, shall be held by them in joint tenancy."

In *Davis v. Clark* (26 Ind., 424), the Supreme Court of Indiana, considering these sections of the statute, uses this language: "At common law, if an estate is granted, as in this case, to a man and his wife, they are neither properly joint tenants, nor tenants in common, for husband and wife being considered one person in law, they cannot take the estate by moieties; both are seized of the entirety, *per tout*, and not *per my*. Neither can dispose of any part of the estate without the assent of the other, but the whole must remain to the survivor."

The court in the same case decides that the statute has not changed this common law rule, but has expressly recognized it; that the husband does not, under the statutes of the State, acquire any legal interest or estate in the lands of the wife, but the same and the profits thereof remain her separate property; and that when land is conveyed to husband and wife, the former has not such an estate in the lands as is subject to sale upon execution. The right of survivorship does not constitute a contingent or vested remainder, but is a mere incident of the estate.

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To the same effect is the case of *Arnold v. Arnold* (30 Ind., 305). The rule is there settled, on a proceeding in partition between the heirs of the deceased husband and the surviving wife, that the whole estate remains to the survivor, which is declared to have been the law in this State from the statute of January 2, 1818. In the same direction is *Simpson v. Pearson* (31 Ind., 1).

There are some other cases in Indiana, and these cases, and others in the different States, are examined in an elaborate opinion of the Supreme Court in *Chandler v. Cheney* (37 Ind., 391). The subject is exhaustively discussed, and this conclusion reached, as it is well-stated in the head-notes: "The same difference which existed at common law between joint tenants and tenants by entireties continues under our statute. In both the title and estate are joint, and both have the quality of survivorship. But the marked difference between the two is this: In a joint tenancy either tenant may convey his share to a co-tenant or to a stranger, who thereby becomes tenant in common with the other co-tenant, while neither by the entirety can convey his or her interest so as to affect their joint use of the property during their joint lives, or to defeat the right of survivorship upon the death of either of the co-tenants. There may also be partitions between joint tenants but not between tenants for entireties. While such an estate exists no interest in it can be sold on execution for the debts of the husband or wife, although the conveyance by which the joint estate was created may be set aside for fraud."

In this opinion the case of *Ames v. Norman* (4 Sneed, 683), is noticed, and the ruling therein, that "during their joint lives the husband may dispose of the estate; may lease or mortgage it, or it may be seized and sold upon execution for his debts," is strongly condemned as being a departure from the settled law, and also from the principles which the case itself states in all their strength.

And finally, in *Jones v. Chandler* (40 Ind., 588), the same court adheres to its former opinion, and holds that "the following clause in a will, 'To my son, Algernon R. Jones, his wife

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and his heirs, seven-thirtieths of my estate,' created an estate by entirety in Jones and his wife, and he could not alienate it, nor could it be sold on execution against him to her prejudice."

These decisions settle the question as a rule of property in Indiana. When the adjudication in bankruptcy was made, Benson had no interest in this property which he could alienate. Under the deed of assignment the assignee took no interest whatever, present or contingent.

The question of divorce remains to be considered. This separation was decreed some months after the adjudication, and although the statement of facts is by no means full, it is to be inferred that, as the divorce was in favor of the wife, it was by reason of the fault of the husband. The question, what is the effect of the divorce under such circumstances, is one of difficulty. The statute on the subject (see Acts 1873, Section 18, p. 111) provides that "a divorce granted for misconduct of the husband shall entitle the wife to the same rights, so far as her real estate is concerned, that she would have been entitled to by his death." But here at once arises the question, what is her real estate? In those instances where her title to real estate is affected by the marriage, the application of this statutory rule presents no serious difficulty. The estate by entirety, however, has been so defined as to leave no interest in either husband or wife that one can enjoy separate from the other. Indeed, say the court: "there is no separate interest." (*Chandler v. Cheney*, 37 Ind., 391.) Considered apart from this provision of the statute, and regarding this estate in the light above referred to, it becomes exceedingly difficult to determine the effect of the divorce upon it. The tenants whose joint use and whose joint title, extending through the entire interest conveyed, constitute the distinctive characteristics of the tenancy may, quoad hoc, be left as the decree of divorce found them. Again, it may be said that such a title created in view of the marriage relation, founded upon it and determinable when that relation ends by death of one of the grantees, is determined by a divorce as absolutely as by death. But death leaves a survivor. Divorce leaves the two, each having,

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under the original conveyance, an equal right. The marriage relation, the very ground of a tenancy by entirety, is gone. Does the whole estate thereupon vest in the innocent party? Is the joint holding turned into a tenancy in common? Or does the law leave the divorced husband and wife to quarrel over an interest in land which the law is incapable of giving exclusively to one, or dividing between both? Public policy would seem to require that no such anomaly should exist; and that persons who are found by the law to be unfit to live together should have a legal method of settling the controversy which an estate of this nature must, under such circumstances, be sure to kindle. In this State these questions are not settled. Their settlement belongs more properly to the State court than to this tribunal, nor do we think it necessary to consider the matter here, and in this case.

It is enough to know what definition of the estate has been given by the Supreme Court; and that definition makes it a joint estate, not in any manner separable by the act of either joint tenant, which cannot be mortgaged or alienated otherwise than by the joint act of both, and which cannot be seized or sold upon judicial process by the creditors of either. The Supreme Court declares in express terms that there is no separate interest. Now, if the effect of the divorce is, by a dissolution of the marriage, to destroy the unity of possession, and to turn what was a holding *per tout* by husband and wife, into a tenancy in common, it is simply, by operation of law, the creation of a new interest in the bankrupt, and is to all intents and purposes a new acquisition, subsequent to adjudication, which cannot be claimed by the assignee. If, on the other hand, the decree of a divorce in favor of the wife, for the fault of the husband, vests the whole title absolutely in her, as if he were dead, still less has this court anything to do with it. The petition of the assignee is dismissed.

Bailey, Assignee, etc., v. Comings.

UNITED STATES CIRCUIT COURT—E. D. MISSOURI

OCTOBER 25, 1877.

A bachelor may be considered as the head of a family, so as to be entitled to a homestead exemption, when his widowed sister has resided with him, taking charge of his household and domestic arrangements, and paying no board, but regarding it as her home.

The right to such exemption is not abandoned by residence of the bankrupt for a time at another place, occasioned by ill-health.

ELIJAH BAILEY, Assignee, etc., v. DUDLEY C. COMINGS.

THIS was a bill of review, seeking to reverse the decision of Judge Treat sustaining the bankrupt's exceptions to his assignee's report, refusing to set him off a one thousand five hundred dollar homestead and certain personalities amounting to five hundred dollars. The assignee's refusal was on the ground that the bankrupt was not a housekeeper or head of a family. The exceptions alleged that he was such a housekeeper when he filed his petition in bankruptcy. The issues were tried before United States Register Enos Clarke, who held that the bankrupt was not such a housekeeper, and overruled the exceptions. On application to Judge Treat to reverse the decision, he heard the same evidence that had been heard by Register Clarke, and held that the bankrupt was such head of a family, and sustained the exceptions.

Mr. Dudley C. Comings, the bankrupt, was a bachelor, and from 1852 or 1853, lived on a farm about twelve miles from Monroe City, on which the exemption is claimed, with a sister, who, from that date until the farm was paid for, furnished funds for its purchase and improvement, she and he furnished money and labor in unequal proportions. Another sister, an invalid, formed part of the household until her death, in 1861. In 1869, the surviving sister married and moved away, and remained away until her husband's death in 1870. In 1872, she returned to the home of bankrupt, which she made her home, and where she left her furniture and her room furnished. Her health being critical, she visited much of her time in the East,

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and also with her two brothers living at Monroe City. The bankrupt's health failing him, he also went to Monroe City, and lived or slept, ate, etc., with a brother, doing such work as he could in consideration for his board. When his health was recovered, he returned to the farm, and was living there when he filed his petition in bankruptcy. There was also another view relied on by the bankrupt. In 1871, the bankrupt becoming feeble, engaged a family (Algers) to come and live in the house with him, and operate or work the farm on a division of the crops, etc. They were all the time subject to his management and control, and were with bankrupt at the filing of this petition.

It was complained that while at Monroe, the bankrupt once voted, and there was some evidence that he spoke of Monroe as his home, and that during his stay there he was nominated as a candidate for justice of the peace. It appeared, however, that he never authorized his name to be so used.

DILLON, J.—The District Court sustained the claim of the bankrupt to a homestead exemption under the Missouri statute on that subject. The assignee contests the correctness of this ruling and brings the case here for review. I have read the evidence contained in the record, covering over one hundred pages. The statute of Missouri gives to each housekeeper or head of a family resident in the county "his homestead used by him as such," to the extent of not over one hundred and sixty acres, and in value not over one thousand five hundred dollars. (1 Wagner Stat., pp. 603, 604, 697.) Certain other limited exemptions are made to each "head of a family."

If the bankrupt is entitled to a homestead, I am of opinion that that right was not abandoned by his residence at his brother's in Monroe City, he having left his property on the home farm, except his wearing apparel and a few tools, and having gone to Monroe City because of his feeble health, and to be with his brothers, and having resumed his usual residence on the farm in which the exemption is claimed, before filing the petition in bankruptcy.

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I am of opinion that if it was essential to maintain the bankrupt's claim to the exemption to hold that the Algers (who were tenants under a special arrangement, and not relatives or dependents of the bankrupt) were part of or constituted the bankrupt's family, that this position could not be sustained.

The bankrupt had never been married, and if he had any family, it was constituted of himself and his widowed sister, Mrs. Metcalf.

Years before, when the farm was being opened and improved, two unmarried sisters lived with him and were then part of his family. One of these sisters died, the other married Mr. Metcalf, say about 1869. She resided with her husband until his death in 1870. She was without children. I infer she had very limited means. In 1872, she returned to the bankrupt's farm as her home, brought her household goods there, and managed his house and household affairs. She paid no board. She was quite advanced in years, her health was poor, and the work was too hard; and by the advice of her physician she went in 1873 to reside with her brothers (two of them living as one family) at Monroe City, about twelve miles distant. She always paid her board at her brothers in Monroe City. The bankrupt's health was also poor, and about the same time he left his farm with the Algers, and went to live with the same brothers at Monroe City, doing enough about the brothers' mill to equal the value of his board. In the spring of 1876, shortly before the bankruptcy, the bankrupt went back to the farm. The brothers who owned the mill at Monroe City failed. Mrs. Metcalf went East and did not return to the farm until after the bankruptcy.

If we regard the direct statements of the bankrupt and Mrs. Metcalf, as to their purposes and intentions, the homestead right exists. While the facts cloud or render somewhat doubtful these declared purposes and intentions, on the whole, I think the circumstances, the undisputed facts, show that the right exists. I am clear that the right, if it ever existed, was not abandoned by the bankrupt's residence at Monroe.

The case turns upon the question whether Mrs. Metcalf

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was part of the bankrupt's family. She lived there years before her marriage. It was her home prior to that event. After her husband's death she went there, and her brother received her as a member of his family, gave her a room, and she was in charge of his household and domestic affairs. She intended to remain there. She had no home of her own. Her household goods were there. She paid no board, and was not expected to. Her health failed, and she went, under the advice of her physician, to Monroe. Her relations to her brothers there were very different from her relations with her brother the bankrupt. Mrs. Metcalf says in her testimony that the bankrupt's house was regarded by her as her home, and she explains her absence therefrom by the condition of her health.

The case is a close one, but under all the circumstances, I am of opinion that the District Court was justified in regarding the bankrupt as a housekeeper or head of a family within the meaning of the Missouri statute, and its order in this respect is affirmed.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1877.

A creditor of the bankrupt, whose claim is secured by mortgage, may, after having proved his claim in the bankruptcy proceeding, and upon leave of the Bankrupt Court, foreclose his mortgage in a State Court, if the assignee does not object.

As to the bankrupt and his wife, the bankruptcy proceedings do not divest the State Court of jurisdiction of an action to foreclose a mortgage given by them.

McHENRY et al. v. LA SOCIÉTÉ FRANÇAISE.

IN error to the Supreme Court of the State of California.

The action was brought by La Société Française, D'Épargnes et de Prévoyance Mutuelle, against John McHenry and wife, and others. The judgment below was in favor of plaintiff.

McHenry et al. v. La Société Française.

WAITE, C. J.—In *Claffin v. Houseman* (15 N. B. R., 49, 93 U. S., 130), we decided that under the law as it stood previous to the adoption of the Revised Statutes, the Courts of the United States did not have exclusive jurisdiction of suits for the settlement of conflicting claims to property belonging to the estate of a bankrupt, and that an assignee in bankruptcy might sue in a State Court to collect the assets. In *Mays v. Fritton* (11 N. B. R., 229, 20 Wall., 414), we also held, that if an assignee in bankruptcy submitted himself to the jurisdiction of a State Court in a suit affecting the estate which was pending when the proceedings in bankruptcy were commenced, he was bound by any judgment that might be rendered. And in *Eyster v. Gaff* (13 N. B. R., 546, 91 U. S., 521.), Mr. Justice Miller, speaking for the court, said: "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of his rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred jurisdiction for the benefit of the assignee in the Circuit and District Courts of the United States, it is concurrent, and does not divest that of the State Courts."

The principles upon which those cases rest are decisive of this. The complainant, having a debt against the bankrupt secured by mortgage, proved the claim against the estate: This, under Section 20 of the Bankrupt Law (14 Stat., 526; Rev. Stat., Section 5075), admitted the complainant as a creditor of the general estate only for the balance of the debt after deducting the value of the mortgaged property, to be ascertained by agreement, sale, or in such other manner as the Bankrupt Court might direct. The assignee is not required to take measures for the sale of mortgaged property unless its value is greater than the incumbrance. His duties relate chiefly to unsecured creditors, and he need not trouble himself about incumbered property, unless something may be realized out of it on their account, or unless it becomes necessary to do so in order to ascertain the rights of the secured creditor in the

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general estate. If he does, and it becomes necessary to adjust the liens before his sale, he may, under the ruling in *Clafin v. Houseman*, institute the necessary proceedings for that purpose in the courts of the United States, or of the State, as he chooses. If he does not, and the secured creditor wishes to make his security available, the creditor must act, and, having obtained leave of the Bankrupt Court to bring his action for that purpose, he may proceed in the State Court, if the assignee does not object, or in the courts of the United States, at his election. Here the necessary leave to sue was obtained before the decree was rendered, and the assignee, instead of objecting to the jurisdiction of the State Court, consented to that mode of proceeding. The bankrupt and his wife alone objected, but as to them, as we held in *Eyster v. Gaff*, the jurisdiction of the State Court was not divested by the proceedings in bankruptcy.

The judgment is affirmed.

UNITED STATES DISTRICT COURT—E. D. VIRGINIA.

NOVEMBER 27, 1877.

An indictment under Section 5132, R. S. U. S., will lie *before* an order of adjudication in bankruptcy.

An indictment for obtaining goods under false pretenses, founded upon the ninth clause of Section 5132, need not charge an intent to defraud creditors generally.

Such an indictment need not contain the negative averment that the accused was in fact *not* carrying on business and dealing in the regular course of trade when he obtained credit for goods on false pretenses.

UNITED STATES v. JACOB E. MYERS.

THIS was an indictment for violating the 9th clause of Section 5132 of the Revised Statutes of the U. S. The case is heard on a motion to quash the indictment. The grounds of the motion are set forth in the judge's decision.

The indictment charges that proceedings in bankruptcy were commenced on the 15th November, 1877, against the

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accused, upon the petition of Edward Mahon and J. Francis Mahon, creditors of the accused, pursuant to the statute in such case made and provided; and that accused did, within three months next preceding the commencement of said proceedings in bankruptcy, to wit, on divers days and times from the thirty-first day of August to the day and year last mentioned, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from the said Mahons a large quantity of goods and chattels, to wit, twenty-five cases of shoes of the value in all of eighteen hundred dollars, with intent then and there to defraud the said Edward Mahon and J. Francis Mahon, and other persons to the grand jurors unknown, against the form of the statute in such case made and provided.

L. L. Lewis, U. S. Attorney, and *B. W. Horsey*, his assistant, for the prosecution.

A. G. Holladay and *D. J. Godwin*, for the accused, on motion to quash the indictment.

HUGHES, J.—Counsel for the accused base their motion on three grounds.

1. They say that there has been no adjudication upon the petition in involuntary bankruptcy filed by Mahon & Co. against the accused, and hold that the court has no jurisdiction to try the indictment; citing among other authorities *U. S. v. Prescott* (4 N. B. R., 112, 2 Biss., 325, 2 Abb. C. C., 169).

2. They say, further, that the intent charged by the indictment ought to have been an intent to defraud creditors generally, and not merely the creditors signing the petition in involuntary bankruptcy, holding that the addendum, "and other persons to the grand jurors unknown," used by the pleader, has no value; and they cite among other cases *U. S. v. Clark* (4 N. B. R., 59), and *U. S. v. Penn.* (13 N. B. R., 464).

3. They say, in the third place, that the affirmative charge in the indictment of obtaining the goods on credit, "under the false color and pretense of carrying on business and dealing in

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the ordinary course of trade," is not sufficient, and that there should have also been the negative averment, that the accused was not, in fact, carrying on business and dealing in the ordinary course of trade. They cite in support of this objection to the indictment the decision of Mr. District Judge Miller in *U. S. v. Prescott* (2 Biss., 325, 4 N. B. R., 112, and 2 Abb. C. C., 169).

I. As to the first point, it is not well taken. It is true that under the law as it was before the adoption of the Revised Statutes of the U. S., on the 22d June, 1874, there could be no indictment under Section 44 until after there had been an adjudication in bankruptcy.

Until then the language of that section was: "From and after the passage of this act, if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy," do certain acts, or "within three months before the commencement of proceedings of bankruptcy" obtain goods on false pretenses, "he shall be guilty of a misdemeanor, and upon conviction" be punished, etc. And Section 28 of the act as it then was provided that "the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, upon which *an order* may be issued by the court, etc., etc., *shall be deemed and taken to be the commencement of proceedings* in bankruptcy under this act."

The language of the law as it stands in the Revised Statutes of 1874 is different. Section 5132 provides that "Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor, . . . who, within three months before the commencement of proceedings in bankruptcy," obtains goods on false pretenses, etc., etc., "shall be punishable by imprisonment," etc.; and Section 4991 provides that "the filing of the petition for an adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, *shall be deemed to be the commencement of proceedings in bankruptcy.*"

While it was a question, therefore, in 1870, when the case

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of *U. S. v. Prescott* was decided, whether an indictment for obtaining goods on false pretenses would lie before adjudication, there is no such doubt now. The mere fact of "filing the petition" in involuntary bankruptcy fixes the date and fact of the "commencement of proceedings in bankruptcy," and renders the right and power of prosecution wholly independent of the adjudication.

II. Nor is the second point of the accused's counsel well taken. The indictment in the case of *U. S. v. Clark* was for fraudulently *disposing of* goods which had been obtained on false pretenses with intent to defraud creditors, and was founded upon the tenth clause of Section 5132. In such a case it is necessary to charge an intent to defraud creditors generally. But for the Bankruptcy Law, the laws of most of the States allow a debtor to dispose of his property for the benefit of some creditors to the prejudice of others. But the Bankruptcy Law makes such disposal a fraud upon others, and makes it a criminal offense. It was therefore necessary to make the intention to defraud creditors generally a necessary ingredient of the offense defined in the tenth clause of Section 5132.

But the case of *obtaining* goods on false pretenses is quite a different one. If the goods are obtained from one person only, the intent to defraud that person alone makes a complete offense, and therefore it is only necessary to charge the intent as having existed with respect to that person.

III. I have more difficulty in regard to the third point taken by counsel for the accused.

If they had stated their proposition less broadly, I might possibly have sustained them. But stated in the breadth which they give it, I do not feel authorized in sustaining it. If I may, by way of argument and illustration, refer to the case as set forth against the accused by the petition in bankruptcy, it is, that being a regular dealer in dry goods and shoes of long standing, and until lately of high credit and standing, he did, while carrying on business in the regular course of trade, yet obtain a very large quantity of goods on pretense of meaning

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to use them in his regular business, with intent to dispose of those particular goods out of the regular course of trade, at a sacrifice for ready cash, with intent to defraud the jobbers who trusted him for the price of the goods. Now, my opinion is that this offense, committed by a regular dealer, is indictable under the ninth clause of Section 5132. But the proposition of the counsel of the accused is, that a regular dealer cannot commit the offense denounced by that clause. They claim that the indictment should have contained the negative averment, that the accused was not, in fact, carrying on business and dealing in the regular course of trade at all. I think that such an averment is not essential. It was not made in this case because it could not have been made with truth. The accused was a regular dealer; and his false pretenses were only held out in regard to the purposes for which he was purchasing on credit the particular goods which he is charged as having diverted, and having intended to divert from the regular course of his trade. I would prefer to have seen a negative averment as to these particular goods in the indictment; but as the absence of it is not complained of by counsel for the accused, the trial must go on, and that matter must take care of itself at a future stage of the proceeding.

On this and on all the points of objection to the indictment made by counsel the motion to quash is overruled.

UNITED STATES SUPREME COURT.

NOVEMBER 12, 1877.

When the condition of a debtor's affairs is known to be such that prudent business men would conclude that he cannot meet his obligations as they mature in the usual course of business, there is reasonable cause to believe him insolvent.

Where a private banker obtains an advance from a bank on his check on New York, and on the following day delivers securities to the bank, stating at the time that he has reason to fear his check will not be met:

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Held, That the securities were transferred with intent to give a preference, and that the bank had reasonable cause to believe him insolvent.

THE MERCHANTS' NATIONAL BANK OF CINCINNATI v. THEODORE COOK et al., Trustees of B. HOMANS, Jr.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Stanley Matthews, for appellant.

E. L. Johnson, for appellee.

HUNT, J.—This action is brought by the assignees of B. Homans, Jr., to recover from the Merchants' Bank certain securities, or their value, received by the bank from Homans. The securities are alleged to have been received in violation of the 35th Section of the Bankrupt Act. That Homans was insolvent when the securities were delivered is not denied, but the bank insists that it had no reasonable cause to believe that such was his condition.

On the morning of August 25th, 1869, the bank advanced to Homans, upon his check on New York, the sum of ten thousand dollars, less the usual charge of one-eighth of one per cent. In the afternoon of the same day Homans became satisfied that his failure could no longer be averted, and that his check thus given would not be paid. He therefore placed in an envelope addressed to the bank the securities in question, with the following note:

"HOMANS & Co., BANKERS,
"No. 23 W. Third St.,
"CINCINNATI, August 25th, 1869. }

"D. I. FALLIS, Esq., PR.

"DEAR SIR:—A disappointment gives us reason to fear that our check of this date may not be paid. I leave with you the enclosed as security.

(Signed)

"B. HOMANS, JR."

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On the morning of the 26th his banking-house was opened for business as usual, Homans himself being present. At 9 o'clock A.M., he left his office for Covington, where he lived, instructing Mr. Wood, one of his clerks, that if he did not return at 10 o'clock, to deliver the envelope addressed to the Merchants' Bank, and another of a like character to another bank. Homans did not return that day, but at ten or half-past ten o'clock, Mr. Albert, another clerk, received directions from him to close the doors, take no more deposits, and pay no more checks. Mr. Albert immediately locked the doors, and receiving the package from Mr. Wood, at once delivered it to the bank. Upon these facts, with one exception as to time, the parties are agreed.

The president of the Merchants' Bank testifies that he found the envelope on his desk in the bank when he came to the bank at about eight o'clock in the morning, and is quite confident that it could not have been later than half-past eight when he became aware of its contents. On the point of time he may easily have fallen into an error, and, we think, there can be no doubt of his mistake. Mr. Homans testifies that he left the banking-house at 9 A.M. to go to Covington, and then gave instructions to Mr. Wood, a clerk, to deliver the envelope if he did not return by ten o'clock. Mr. Albert also testifies that the banking office of Homans was opened at nine o'clock, continued open for about an hour; that he then received orders from Mr. Homans to close the doors; that he did so, and in pursuance of directions then received from Mr. Wood, proceeded to deliver this envelope, with a similar one to another bank, and that this delivery was made at ten o'clock or half-past ten o'clock.

Mr. Yergason, the cashier of the Merchants' Bank, presented at Homans' office a clearing-house check, and payment thereof was refused. Mr. Albert testifies that this check was presented and payment demanded by the cashier after the doors were closed, and after the envelope had been delivered at the bank. Mr. Fallis testifies to the same purport, and that this demand and refusal was made between nine and ten o'clock in the morning.

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That Homans intended to give the bank a preference over other creditors—that is, that he expected and intended by means of the inclosures sent, that the bank should receive the full amount of its ten thousand dollars check, while other creditors would receive but a portion of their debts, is too evident to require discussion. Mr. Homans states in explicit terms that he was at that time aware of his inability to pay his creditors in full, then or in the future.

The important question remains, had the Merchants' Bank, when it received the packages, reasonable cause to believe that Homans was insolvent? If it had, the 35th Section of the Bankrupt Act declares the transaction to be void. If it had not, it may lawfully hold the securities or their avails.

The president of the bank testifies that there was nothing in the note sent with the securities, or in the transaction itself, that led him to suspect the insolvency of Homans. While it is impossible certainly to indicate the operation of the human mind, we cannot but think the witness is again at fault in his recollection, and that his idea at the time of testifying was not the one that controlled his action when the occurrence took place.

1. The transaction, on the theory of the solvency of Homans, is quite inexplicable. It was the general practice of these parties, as of all bankers in their city, to deal in exchange on New York. The practice was thus: The Merchants' Bank wanted ten thousand dollars to be used in the city of New York. Mr. Homans had the money there which he did not need for his own purposes. The bank gives him ten thousand dollars in currency, less the difference in exchange and takes his check on his banker in New York for the sum named. This is the theory of the transaction. In fact, Homans had no funds in New York, but gave his check that he might obtain the currency to be used to meet pressing demands at home. The theory of the bank, however, was as is above stated.

That a banker in Cincinnati, having sold a sight-draft on New York, should the next day, without agreement or solicitation, send to the holder collaterals to secure the payment of the

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draft, would be an extraordinary transaction, and in the language of Mr. Cook, president of the Fourth National Bank of Cincinnati, it would be a taint upon the standing of the drawer, and would at once impress one with the idea that the drawer was insolvent or in great financial difficulty. Such is the evidence also of Mr. Griffiths and Mr. Espy, bankers of the same place. The giving of security, under such circumstances, is in repugnance to the idea of the whole transaction, which is that of a quick and simple commercial exchange of funds. One who lends money on bond or time notes may well expect and take security for their payment. It is in harmony with the transaction. But if a check is taken in payment of an account presented, no one would expect to receive collateral security for its payment. It would not, however, be more incongruous, or more inharmonious, than the giving of collateral security for the payment of the draft in question. The giving and acceptance of the collateral could have but one significance to the mind of a banker.

2. The letter accompanying the collaterals, we think, gave a notice which a business man could not misunderstand, especially in connection with the fact, known to the bank, that a short time prior thereto there were evidences that Homans was in need of money, and that there were clearing-house checks to a large amount outstanding against him. The letter enclosed said: "A disappointment gives us reason to fear that our check of this date may not be paid. I leave with you the enclosed as security." Its language is expressive to a business man. It means, not that we fear our check may not be paid, but that it will not be paid. We are disappointed in obtaining the funds to pay it.

This disappointment is not the result of an accident or of a misunderstanding (for that apology would have been given if it existed), nor is the disappointment a temporary one, for that would have been stated if true. We do not expect to be able to pay it, and we enclose you securities, which will not indeed give the money to which you are entitled, but will protect you from ultimate loss. This is what the letter means. It is a

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statement of inability from want of funds to meet a current and most pressing debt, either in New York or in Cincinnati, the non-payment of which involved public suspension and bankruptcy. Practically it was so understood, for we find—

3. That immediately upon its receipt the Merchants' Bank sent for payment its clearing-house check, previously unrepresented. The testimony of Mr. Albert shows that the Merchants' Bank was not in the habit itself of presenting clearing-house checks, but that in about fifteen minutes after he had left the envelope and securities at the bank, Mr. Yergason, the cashier, in person, presented the clearing-house check and requested its payment. The relation of cause and effect is a more rational explanation of this speedy demand than to suppose it to be a mere coincidence.

It is scarcely necessary to discuss the authorities as to the meaning of the "words having reasonable cause to believe the party to be insolvent." When the condition of a debtor's affairs are known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him to be insolvent. Knowledge is not necessary, nor even a belief, but simply reasonable cause to believe.—(*Toof v. Martin*, 6 N. B. R., 49, 13 Wall., 40; *Buchanan v. Smith*, 7 N. B. R., 513, 16 Wall., 277; *Wager v. Hall*, 5 N. B. R., 581, 16 Wall., 584.)

There is nothing in the subsequent decisions of this Court to vary these principles, and it is not worth while to go through the English cases founded upon a statute containing different language from our own.

Upon the whole case we are all of the opinion that the Court below decided correctly in holding that Homans was insolvent, that the securities were transferred with a view to give a fraudulent preference, and that the bank had reasonable cause to believe that Homans was insolvent when it received and appropriated the securities presented to it.

The decree must be affirmed.

Ex parte Tremont National Bank. In re Battey.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

Until an assignee is appointed, the bankrupt is the trustee of his estate for the benefit of his creditors.

If he is indorser upon notes or bills which mature before the appointment of an assignee, he may waive demand and notice.

Semble; that he may, even without leave of court, begin any suits which are necessary to save the statute of limitations, or are otherwise of immediate urgency, although he cannot, without suit, receive payment.

*Ex parte TREMONT NATIONAL BANK. In re
GEORGE I. BATTEY.*

THE Tremont National Bank held certain promissory notes of third persons, indorsed by the bankrupts, which fell due after the adjudication of bankruptcy and before the appointment of the assignee. During this period, and before the maturity of the several notes, the bankrupts, at the request of the bank through its attorney, signed a waiver of demand and notice, which accordingly were not duly made. Upon an offer by the bank to prove against the assets for the amount of the notes, the assignee objected, and the case was submitted to the court upon a written agreement of the facts above stated.

F. V. Balch, for the creditor.

W. A. Field, for the assignee.

LOWELL, J.—It was decided by Lord Eldon, in 1812, that when a bill is dishonored after the bankruptcy of the drawer, a notice to him is a sufficient and proper notice if his assignee has not been appointed. "The bankrupt," says the learned judge, "represents his estate until assignees are chosen." (*Ex parte Moline*, 19 Ves. Jr., 216.) This statement of the law has been copied into the text-books, and was the guide, most probably, of the action of the bank in this case. (Story, Bills of Exch., § 305; Byles on Bills, 228; see *Ex parte Johnson*, 3 Dea. & Ch., 433.) Mr. Robson says, notice shall be given to the trustee (assignee), or if none has been appointed, it would seem the notice should be to the registrar as official trustee.

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(Robson's Bankruptcy, 178.) By our law the register is not official assignee, but the bankrupt remains, as in Lord Eldon's time, the trustee of his estate until the assignee is appointed.

Granting that notice is necessary, which is certainly the better opinion upon authority, the bankrupt is the only person who can be notified. If immediate action is necessary against the promisor or acceptor to save a probable loss, the bankrupt, on application to the court, would be permitted to prosecute; indeed, though the bankrupt's debtors cannot safely pay him their debts after the proceedings are begun, yet I have very little doubt that he may, even without leave of court, begin any suits that are necessary to save the statute of limitations, or are otherwise of immediate urgency. It has always been one of the anomalies of the Bankrupt Law, but probably a necessary one, that a plea of the plaintiff's bankruptcy is not a bar to an action unless an assignee has been appointed, and not always then unless the assignee has forbidden the prosecution of the suit, though a plea of payment to the bankrupt might be bad if the assignee should intervene. In other words, a bankrupt may sue, though he cannot, without suit, receive payment.

The creditor in this case cited the statement of a text-writer, that the person on whom a demand should be made may waive it. No case was cited, but I think one is hardly necessary. Taking the meaning to be that the person referred to is one to whom notice is to be given as a party interested, or a general agent of such an one, and not a mere messenger or conduit, the remark is undoubtedly sound.

It was argued that though the bankrupt is the person to be notified as indorser of the dishonor of a note by the maker, and as such may waive the notice, yet he cannot dispense with the demand on the maker. This argument runs counter, I think, to the usual commercial practice and understanding. A waiver of demand and notice is very common, but a mere waiver of notice much less so. The purpose and meaning of the waiver commonly is, that the parties are well aware of the standing and situation of the promisor, and consider a formal demand and notice unnecessary for some reason or other. If

In re Smith.

the bankrupt has power to protect his estate, he has power to waive forms, and to undertake whatever action may be necessary, as if such forms had been complied with. The same argument which establishes his right to require notice, proves that he may waive the demand and take notice at his peril.

I am not sure that one of these notes may not have matured after the assignee was appointed; nor, if it did, whether there was any reason to hold that the assignee should have been notified, or asked to waive notice. Reserving any question that may arise on such a note, I admit the debt to proof.

Proof admitted.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

NOVEMBER 10, 1877.

The bankrupt, nearly a year before the petition was filed, left for collection with his attorney a note signed by a third person, and subsequently drew several orders upon him payable out of the proceeds thereof; *Held*, that the holders of the orders were entitled to payment out of such proceeds, in preference to the assignee.

In re E. M. SMITH.

The decision of this case was submitted to the Court upon a written statement of facts in accordance with Rev. Stat., § 5011.

Smith, the bankrupt, nearly a year before the petition was filed, left for collection with Mr. Field, his attorney, a note signed by a third person, for eight hundred and fifty dollars, and an action was brought upon it, which ripened into a judgment at about the time the bankruptcy took place, which was August 25, 1875. In the meantime, the bankrupt drew several orders upon Mr. Field, some of which were negotiable and some not, requesting him to pay divers sums to the several payees. It was not contended that any of these orders were fraudulent or voidable for want of consideration, or as preference or otherwise. It was the intention of the bankrupt that these orders should be paid from the proceeds of the note when collected

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by Mr. Field, and he so informed Mr. Field and the payees; and the acceptance was in each instance expressed substantially as follows: "Accepted when collected," or "After collections made over and above the amount of prior acceptance." Mr. Field obtained judgment for the debt and costs, and levied on certain real estate of the judgment debtors, but no money has come to his hands, as the debtors have a right to redeem within a certain time.

Soon after the levy, the assignees in bankruptcy of Smith's estate notified his attorney, Field, that they discharged him from the case, tendering him the taxable costs, and offering to pay for his services up to that time. They refused to indemnify him against the acceptances above mentioned, and notified him that they revoked the same; and he declined the tender.

Upon these facts, the question submitted was whether the assignees in bankruptcy or the holders of the orders had the better title to the proceeds of the note or of the judgment obtained thereon.

LOWELL, J.—I suppose that the aggregate amount of all the orders given by the bankrupt, and conditionally accepted by Mr. Field, will be enough to absorb the net proceeds of the judgment, after deducting the reasonable counsel fees of Mr. Field. If not so, the assignees would, perhaps, have a strict legal right to collect the money, even though the orders may be valid; in which case, they would be trustees for the holders of the orders, to the extent of their several demands, and trustees for the general creditors of Smith, for the remainder.

I understand, however, that the question which the parties wish me to decide is whether the orders are valid, and create a change in the proceeds of the judgment against the assignee in bankruptcy; and that the settlement will be readily made by the parties when this is decided.

It is the law that an ordinary bill of exchange, like those which pass between merchants, does not operate as an assignment of any funds in the hands of the acceptor. The reasons are: 1st. That such a bill is a well-known commercial security which is taken upon the credit of the parties; and 2d, the great

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inconvenience to trade if merchants and bankers were to be held as trustees for the holders of all their acceptances. (*Harris v. Clark*, 3 Comst., 93; *Cowperthwaite v. Sheffield*, Id., 243; *Hopkins v. Beebe*, 2 Casey, 85; *Thomson v. Simpson*, L. R., 5 Ch., 659.)

The Supreme Court of the United States, and the courts of many of the States where the question has arisen, have applied a similar rule to bank-checks, "that no right to the deposit of the drawer of the check passes to the payee by the signing and delivering of the check. In other States, the bank-check is held to work an assignment. (See *Bank of Republic v. Millard*, 10 Wall., 152; *Bullard v. Randall*, 1 Gray, 605; *Dana v. Third N. B'k*, 13 Allen, 445; *Carr v. Nat. Security B'k*, 107 Mass., 45; *Lunt v. B'k of North America*, 49 Barb., 221; *Strain v. Gourdin*, 11 N. B. R., 156; *Re Smith*, 15 N. B. R., 459; and the cases cited in Judge Brown's opinion.)

The reasons for this rule do not apply to a draft or order which is made payable out of a particular fund. Such a paper is not, strictly speaking, a bill of exchange, and it is well settled that such an order makes an assignment in equity, whether accepted or not. (*Spain v. Hamilton*, 1 Wall., 604; *Yeates v. Groves*, 1 Ves. Jr., 280; *Ex parte Alderson*, 1 Mad., 39; *Ex parte South*, 3 Swanst., 392; *Diplock v. Hammond*, 2 Sm. & G., 141, 5 DeG. M. & G., 320; *Cutts v. Perkins*, 12 Mass., 206; *Robbins v. Bacon*, 3 Greenl., 346; *Legro v. Staples*, 16 Me., 252; *Lowery v. Steward*, 25 N. Y., 239; *Moody v. Kyle*, 34 Miss., 506.)

Then the only question is, whether these drafts were payable out of the proceeds of this note; and it cannot be doubted that they were. The drafts, as drawn, do not express this fact, but the mode of acceptance does. An agreement for such payment is perfectly good in equity, though made wholly by word of mouth; and therefore the facts found in this case, that the creditors were severally informed that the order was to be paid out of the proceeds of the judgment, would bind the fund, in equity, even if the acceptance had been absolute.

It is hardly necessary to say that an assignee in bankruptcy

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takes the property' subject to all equitable as well as legal liens.

My decision, therefore, is that the several holders of the orders are entitled to be paid the amounts of their several acceptances in preference to the assignee in bankruptcy.

UNITED STATES CIRCUIT COURT—VERMONT.

OCTOBER 2, 1877.

The assignee takes the property of the bankrupt as an attaching creditor would take it, subject to all legal claims upon it.

The bankrupt made a contract with S. & Co. to manufacture hides into leather for them, the hides to be purchased with the proceeds of drafts upon S. & Co.; the drafts were discounted at a bank, and the proceeds thereof placed to the credit of the bankrupt in his general account; the hides purchased were paid for by checks upon such account; *Held*, that the hides were purchased for S. & Co. and became their property; that it is not necessary that the agent should pay out the identical bank-notes he receives from his principal.

Where some of the hides were purchased with the proceeds of drafts which S. & Co. refused to accept, their title to such hides is not affected by such fact, but they become debtors to the estate or to the bank advancing the money.

The title to the leather, when completed, passes under the arrangement for the purchase of the hides.

JAMES O. SAFFORD & CO. v. JOHN J. BURGESS, Assignee of R. S. READ.

HUNT, J.—The findings of fact by Judge Shipman, and his conclusions of law in this case, are so satisfactory in their general character as to require little to be said in relation to them.

The agreement under which the hides were tanned was a common one, and vested the title to the property purchased in Safford & Co.

The assignee takes the property of the bankrupt, as an attaching creditor would take it, that is, subject to all legal claims upon it. The case is not that of a *bona fide* purchaser, whose

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rights are in many cases superior to those of any ordinary creditor.

Two suggestions are made by the appellants, which should be considered.

1. The money obtained from Safford & Co. by Read was not identically paid to the persons from whom he purchased skins. He obtained funds from Safford & Co., from time to time, by his drafts upon them, which drafts were discounted by a bank and the proceeds placed to the credit of Read. His account at this bank was a general one. All moneys from every source coming to the bank on his account were placed to his credit, and his checks for the purchase of skins not only, but for any other purpose, were charged against him.

The appellant then orally argues that, upon this state of facts, the skins were not purchased with the funds of Safford & Co., and that therefore the case is not within the many authorities cited, which hold that "the person for whom and with whose funds property is purchased becomes the owner of it, although the purchase is made by an agent in his own name and without disclosing his principal." (*Ridout v. Burton*, 27 Vt., 383; *Hall v. Williams*, Ib., 405.)

This argument is not sound. The cases cited show that the title vests in the principal when the agent advances his own funds, provided the purchase is made under and in execution of the authority.

It is not necessary that the agent should pay out the identical bank-notes he receives from his principal. If Read had received from Safford & Co. five one hundred dollar bills, and on making a purchase had paid in whole or in part other bank-bills which he had in his pocket-book, the question would have been not as to the identity of the currency, but was the act in execution of the authority given. Any considerable business must be done by the means of bank-checks. No man now carries large amounts on his person to pay for purchases made, and the fact that Read's payments were made by or by means of bank-checks, upon a fund made up of all his credits, will not make him any less the disbursing officer of Safford's funds in the

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purchases actually made on their account. The evidence is conclusive that all the property in question was purchased for and applied in the performance of the contract with Safford & Co.

2. It is insisted also by the appellant that a portion of the skins were purchased by Read with the proceeds of drafts on Safford & Co., which that firm refused to accept. As to these it is claimed that no title vested in Safford & Co.

It is far from certain that the statement of facts here made is sustained by the evidence. The sum of four thousand five hundred dollars was paid by Safford & Co., and it is difficult to find the evidence that a larger amount was invested in the purchase of skins under the contract.

But if the fact be assumed, does it place the assignee in any better position? If two hundred and twenty-five dollars were thus expended in the purchase, as is insisted, it was an expenditure under and in performance of the contract, and it may well be argued that Safford & Co. are debtors to the estate to that amount. It may well be argued also, either that Safford & Co. are indebted to the bank advancing this money, upon a promise to accept the drafts, to be implied from the circumstances, or if not, that the bank can claim an equitable lien upon the property thus purchased with their funds. But the assignee does not represent this claim. It is a specific claim to be asserted by the specific party in whom it is vested, and not in one who is a general representative of the bankrupt, or of the bankrupt and his creditors. Whenever the bank with whose funds the property was alleged to have been purchased shall make the claim, it will be proper that all the facts connected with it, and the equities upon both sides, be presented and considered. It cannot be done upon this record or upon the facts before us, and does not aid the title of the assignee to the leather in question.

3. It is argued further that the title to the leather, when completed, does not pass under the arrangement for the purchase of skins. That if one takes timber to a carriage-maker, saying that he wishes it to be built into a carriage, retaining the title in

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himself, and the carriage-maker adds the iron, the leather, and the paint to the timber, thereby completing a carriage, that this does not give the title to the carriage to the owner of the timber delivered.

When that case shall be presented, it will be in time to decide it. The one before us is not identical or similar to it. The substance, the body, and identity of the skins is that of the leather. Its tendency to decay is arrested; it is hardened, and enlarged, but remains the same substance. A better analogy would be that of logs converted into planed lumber, steamed lumber, or lumber impregnated with chemical substances for its preservation. See the Vermont cases, *supra*; *Marsh v. Titus*, (6 N. Y. S. C., 29.) See also *Silsbury v. McCoon* (3 N. Y.), (3 Comst.), 379, and the learned argument of Mr. Nicholas Hill. The rule there established is this: If a chattel wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs to the original owner, even as against a *bona fide* purchaser. When it is converted into a thing of a different species, as wheat into bread, olives into oil, grapes into wine, corn into whiskey, or wool into garments, it may be reclaimed by the owner except as against an innocent purchaser.

The decree must be affirmed.

WHEELER, J., concurs.

SUPREME COURT—CIRCUIT—NEW YORK.

JANUARY, 1877.

A general assignment for creditors, without giving priority, is superseded by proceedings in bankruptcy.

Where, after a general assignment for creditors has been made, a judgment is recovered in the ordinary course of practice and without collusion between the debtor and creditor for the purpose of giving priority, such

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judgment and the levy under it are good, even as against an assignee in bankruptcy subsequently appointed.

DOLSON et al. v. KERR, Sheriff, etc.

THIS was an action to recover the value of a pair of horses sold by the sheriff under a judgment and execution in favor of one Chester Freer, and against one John C. Shaffer, whose general assignees, for the benefit of creditors, the plaintiffs were. At the close of the case the defendants moved for a nonsuit. The facts appear in the opinion.

J. N. Fiero, for plaintiffs.

J. M. Cooper and *A. Schoonmaker, Jr.*, for defendant.

WESTBROOK, J.—Preliminarily to the statement of my views, let me state what facts in this case are undisputed. On the 11th of August, 1873, John C. Shaffer, being largely in debt, made a general assignment to the plaintiffs, Charles W. Deyo and William Dolson, for the benefit of his creditors, the creditors sharing alike, and no creditor having priority, one over the other. On the 13th of August (being two days after that date) the hotel (which property passed to the assignees by the general assignment), together with the personal property, was leased to Mrs. Shaffer until the following spring at fifty dollars per month, she agreeing to quit whenever the property was sold. On the 11th of August, 1873, Freer commenced an action to recover, and recovered judgment upon a note which Shaffer had given to him upon the purchase of a pair of horses, and such proceedings were had in that action that, on the 3d of September, 1873, he recovered a judgment for two hundred and ninety-nine dollars and fifty-seven cents. On the same day an execution was issued upon the judgment, and on the same day a levy was made upon the pair of horses which had been previously sold by Freer to Shaffer, and the horses were, in fact, sold on the 12th day of September, 1873. The present plaintiffs began this action, I assume, some time in September, 1873—

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Mr. FIERO—September 9th.

The COURT—September 9, 1873. Bankruptcy proceedings were commenced by Atkins, one of the creditors of John O. Shaffer, in the United States District Court for the Southern District of New York, some time in October, 1873—

Judge SCHOONMAKER—October 11, 1873.

The COURT—The 11th of October, 1873. After, therefore, the levy had been made upon the property under the execution of Freer, a general assignee in bankruptcy was appointed in those bankruptcy proceedings some time during the year 1874. The general assignee in bankruptcy, Daniel W. Guernsey, was appointed some time during the year 1874; the exact date does not become important—

Judge SCHOONMAKER—22d of January, 1874.

The COURT—The plaintiffs in this action, on the 11th day of August, 1874, under their hands and seals, executed to Daniel W. Guernsey a paper writing, which is entitled "District Court of United States for the Southern District of New York. In the matter of John C. Shaffer, bankrupt, in bankruptcy, Southern District of New York, to wit." It recites the making of the assignment to Deyo and Dolson by Shaffer, August 11, 1873, and also recites the commencement of the proceedings in bankruptcy and the appointment of Guernsey as general assignee, and then it declares: "And whereas said assignee has entered into and is in full possession of the said property, and has made application to this court for its order authorizing and directing him to sell the same, therefore, in consideration of one dollar, and in order that a purchaser or purchasers of such property, or any part thereof, on a sale by said assignee, may receive such benefit, if any, which we, as such assignees, have in or to said property, if any part thereof, they stipulate and agree to unite with the assignee in bankruptcy, as such assignees, in the conveyance or conveyances, if more than one, to the purchaser or purchasers of such property on a sale thereof by the assignee in bankruptcy." The paper seems to be a full recognition of the regularity of the proceedings in the Bankruptcy Court, and a full recogni-

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tion of the fact that he was adjudged a bankrupt, and a full recognition of the fact that the assignee in bankruptcy took the title which the general assignees had acquired by the assignment. These are the facts of the case as I understand them to be.

I was at first inclined to send this case to the jury upon the question of actual fraud in the assignment, for we have spent some time in trying that issue (and I would like very much to have the verdict of the jury upon that issue); but even should I do that, and if I should then set aside the verdict because the action could not be maintained, and the court above should sustain my ruling, the action would still have to come back for a retrial. It could only be got clear of by a new proceeding in this court, and the saving of expense which I hoped to get by adopting that practice I would not succeed in getting. I think it is better, therefore, that I should dispose of this whole case upon the questions of law in it, and if I am wrong, the question of fact can afterwards be disposed of, and if I am right, that ends the case forever.

I ought to say, before disposing of these questions of law, that upon the issue of fraud I have no doubt in the case whatsoever (I had none upon the previous trial; I have not any now), though, as it is a question of fact, and made so by the statute, I would be compelled to submit it as a question of fact to the jury, unless I dispose of the case upon the other ground. But as I intend to dispose of this case upon the other ground, there can be no impropriety in my stating that I do not think the evidence would be sufficient to justify a verdict in favor of the defendant upon the ground of actual fraud, and these are, in short, my reasons for it: The assignment was general. It was in favor of all creditors, share and share alike. No one creditor could attain any priority over the other under the assignment, provided the assignment was honestly executed and enforced. I know it is urged, from the fact or circumstance of the lease which was made to the wife, the jury would be justifiable in drawing the inference that the whole assignment was made for the purpose of secur-

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ing some benefit to Shaffer. The wife has as good a right under the laws, as they now stand, to make a bargain for herself as any other person, the same as a *feme sole* or a male. I do not think the mere circumstance of the lease being made to the wife would justify the jury in finding actual fraud. That property was in the hands of the assignees, and it had to be disposed of to the best advantage for the creditors. By the lease they would secure a present revenue or income from the property, and as they were unprepared at that time to sell, having no customer, it was kept from depreciation pending that sale. In addition to that, we have the positive testimony of Shaffer and Deyo and Dolson that there was no fraud intended, only an honest distribution of the property among the several creditors. There could be really no fraud intended in the making of the assignment, unless the assignees had been, more or less, parties to the fraud; and when two men, of the character and standing of Deyo and Dolson, swear so positively as they do that this was done in good faith, I believe their statements, and I believe that this assignment was made with the honest intent of making a fair and just distribution of the property among creditors; and I have no doubt it would have been far better for all parties if all parties had acquiesced in allowing the assignees to dispose of the property and execute their trusts.

I have now given my views upon the question or issue of fraud. Can this action be maintained under the facts which I have stated? Now, I understand the following principles have been settled: It has been held that a general assignment for creditors, without giving priority, is superseded by proceedings in bankruptcy, and for the reason, where a person is insolvent and makes an assignment, it places the property beyond the power of the Bankrupt Court, if it stands; and as the policy of the Bankrupt Law is to leave the whole funds and all the property in the hands of the Bankrupt Court, any thing which takes it out of the power of the Bankrupt Act is fraud, in law, upon that Court, and that Judge Blatchford

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also holds in a case to which my attention has been called. I will not refer to that case now. It has further been held, and held in a case in the Supreme Court of the United States, in *Wilson v. City Bank* (9 N. B. R., 97; 17 Wall., 473), that where a judgment is recovered by a creditor in the ordinary course of practice of the courts, and without collusion between the creditor and debtor for the purpose of giving such creditor priority over others, that that judgment, and the levy under it, is good, even as against an assignee in bankruptcy subsequently appointed. Now, apply those principles to this case, without any regard now to this decision that Judge Blatchford has made, and how does this case stand? You can't recover as general assignees; why? Because the proceedings in bankruptcy adjudge them totally void *ab initio*. They relate back to the actual assignment, so that you have no standing in court under your assignment. You can't recover for the benefit of the assignee in bankruptcy, simply and only because the general assignee in bankruptcy does not take priority over the judgment and execution creditor. And I may say, in passing, that from the circumstances of this case, no one would hold that the recovery of Freer was by collusion with Shaffer for the purpose of giving him a priority; on the contrary, the express evidence of Shaffer is, that because he was pressed by Freer, and because he was pressed by others, he took the step which he did, and made the general assignment. The facts of this case, therefore, are clear that the recovery of Freer was not by collusion with the debtor for the purpose of giving Freer the priority; on the contrary, the judgment was recovered without collusion with him, and according to the ordinary course of practice. For these reasons, therefore, I think this action cannot be maintained.

Now let me say a single word about the decision referred to, and a very recent one. It was made on the 9th of December, 1876, and within a month, in *McDonald, as Assignee, v. Moore et al.* (15 N. B. R., 26; 3 N. Y. Weekly Digest, 461); and therefore, of course, there can be no blame attached to the plaintiff's attorneys for bringing this action and seeking to maintain it,

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for the law under the Bankruptcy Act has always been more or less unsettled.. In the case reported, the assignee in bankruptcy was before the court, the general assignee was before the court, and the creditor who had seized the property was before the court. These facts appeared: That, on the 28th of December, 1875, David Solinger, being insolvent, made a general assignment, under the laws of the State of New York, of all his property to the defendant, Mayer, in trust to pay his creditors, share and share alike. Mayer accepted the trust, and took possession of the property on the said day, and complied with the statute as to filing a bond and inventory. On the 4th of January, 1876 (that is, some six or seven days after the assignment), the defendants, Moore, Tingue & Co., recovered a judgment, in a State court, against Solinger for one thousand five hundred and eight dollars and thirty-eight cents, and on the same day an execution was issued to the sheriff, who is a defendant in the suit, and placed in his hands.

On the 5th day of January, 1876, the next day after this, a petition in bankruptcy was filed, and plaintiff was chosen the general assignee in bankruptcy.

These were the claims of the parties: The plaintiff claims, in his bill, that he has a title to the property which was embraced in the assignment to Mayer, superior to the claims of Mayer and of Moore, Tingue & Co., and of the sheriff; that the assignment to Mayer was made in fraud of the Bankrupt Act, and that the property, or its proceeds, ought to go to the plaintiff, as assignee in bankruptcy, free and clear of the claims of all the defendants.

Mayer, in his answer, expresses his willingness to relinquish his trust in favor of the plaintiff, on being paid his disbursements for counsel fees and other expenses in administering his trust, and his commission thereunder under his levy. You could scarcely conceive of a case more like the one here and the one before us.

Held, That the assignment to Mayer must be held to have been invalid as against the rights of the plaintiff under the

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Bankruptcy Act, although it was an assignment in trust for creditors, without preference. Now, why was it so? The court gives the reason: It was made when Solinger was insolvent, and it had the necessary result of preventing the property from coming to any assignee in bankruptcy of Solinger who should be appointed, and of preventing such property from being distributed under the Bankruptcy Act in any proceedings in bankruptcy instituted against Solinger, and therefore it must be held to have been made by Solinger with such view. Mayer had reasonable cause to believe Solinger to be insolvent, and must be held to have known that Solinger made the assignment with such view, because he must be held to the knowledge that the making of the assignment would have the necessary result above mentioned. A general assignment in trust for creditors, without preference, under a State Law, is void under the Bankruptcy Act. (*Globe Ins. Co. v. The Cleveland Ins. Co.*, 14 N. B. R., 311.)

It was further held, that "when the assignment be set aside, it becomes void from the time it was made, against all persons who, after the time it was made, took steps to acquire rights against the property embraced in it as still the property of Solinger, and who, but for the obtainment of the assignment, would have secured and enjoyed such rights free from any obstruction. Such rights arrange themselves in order according to their priorities in point of time.

"As between Moore, Tingle, & Co., and Solinger, the execution of the former bound the goods of the latter from the time the execution was placed in the hands of the sheriff. The assignee in bankruptcy acquired no rights in that respect as against Moore, Tingle & Co. which Solinger did not possess. The assignee in bankruptcy does not occupy a position of *bona fide* purchaser."

It seems to me that this case is directly decisive of the question before us. This case, as I had occasion to remark before dinner, seems to be about like this: Suppose this whole question were before the Bankruptcy Court, all the parties being before it, and the claim was as between these three parties, who was entitled to the property? Are the general as-

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signees, who are the plaintiffs in this action, entitled to it by virtue of the general assignment? Is the general assignee in bankruptcy entitled to it by virtue of the assignment made in the Bankruptcy Court? Or is the defendant (the sheriff) entitled to it under the execution? In just precisely that case, with all those parties before the Bankruptcy Court, Judge Blatchford held that the sheriff was entitled to the property. That is this case exactly. As the action, then, cannot be maintained by you as plaintiffs for your benefit, because the bankruptcy proceedings set aside your assignment from the beginning, as you can't maintain the action in behalf of the general assignee in bankruptcy, because the recovery by Freer was without collusion with Shaffer to give him a priority, Freer is entitled to the priority which his levy gave.

I think it is better, with that express case before me, to hold in conformity with it; and if I am wrong, why, of course, it is very easy to correct me. If you wish to do so, I will put the cause in a shape where you can go to the General Term without giving any security—

Mr. FIERO—I desire it put in that form. I except to your honor's ruling, and I ask to go to the jury upon the question of fraud, and then to go to the General Term in the first instance; also, sixty days' time.

The COURT—Yes, sir; I repeat, if I was not against you upon the legal questions which this case involves, I should send it to the jury upon the question of fact; and whilst I should leave it to the jury to say whether there was or was not actual fraud, I should do so (where there has been one previous disagreement of the jury), with a pretty clear expression of my own judgment that there is no actual fraud in the case. As I said before, what was law under this Bankruptcy Act has always been very doubtful to the profession, and this decision which has recently been made, upon which I base my decision, was only made on the 9th of December last, a month and two days ago. Of course, the law was not so settled when this action was begun and continued. It is due to counsel that I should make that statement.

Southern et al. v. Fisher, Trustee, etc.

SUPREME COURT—SOUTH CAROLINA.

A State court has no jurisdiction of an action brought against a trustee (or assignee) in bankruptcy to enjoin the collection of the assets of the bankrupt.

The assignee holds the assets as an officer of the court which appointed him, and his possession and management thereof cannot be interfered with by the State courts.

Although the assignee may prosecute or defend a suit pending at the time of adjudication, he is not compelled to resort to the State court before which it was pending, but may apply directly to the Federal courts.

SOUTHERN et al. v. FISHER, Trustee of the Citizens' Savings Bank of South Carolina.

This was an action by John P. Southern and L. D. Childs against John Fisher, as trustee of the Citizens' Savings Bank of South Carolina, bankrupt.

The complaint alleged that the said bank, a body corporate under the laws of the State, was, on the 1st December, 1873, duly adjudged bankrupt under the bankrupt laws of the United States, and that the defendant, John Fisher, had been appointed trustee of its estate; that at the time of the adjudication, the bank held as part of its assets two promissory notes signed by the plaintiffs and others, payable to the bank, which were now in the possession of defendant as trustee; that the plaintiffs were induced to sign said notes by the fraudulent concealment of certain facts, which were stated, and which, it was alleged, rendered the notes void as to the plaintiffs; and that the defendant had threatened to commence actions against the plaintiffs on said notes. The prayer of complaint was that the defendant be enjoined from commencing such actions, and that said notes be delivered up to be cancelled. The defendant demurred to the complaint upon several grounds, two of them being: first, that the court had no jurisdiction of the action, it being against the defendant as trustee of the estate of a bankrupt; and second, that the complaint does not state facts sufficient to constitute a cause of action.

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His Honor the Circuit Judge overruled the demurrer, with leave to answer, and the defendant appealed.

McMaster & Le Conte, Rion & Barnwell, for appellant.
Melton & Clarke, Melton & Chamberlain, contra.

Moses, C. J.—The motion to reverse the order overruling the demurrer must prevail. The exception to the jurisdiction of the court, in our judgment, admits of no question, notwithstanding the able argument of the counsel for the appellee.

It is admitted that the jurisdiction of the District Court of the United States extends to “the collection of all the assets of the bankrupt.” If, therefore, the conclusion of the Circuit Court is well founded, it can only be exercised at the forbearance of the State courts. They would thus be converted into courts with full power to administer all the provisions of the Bankrupt Act, by withdrawing from the District Court the assets of the bankrupt, subjecting them to the supervision, management, and control of a court which has no jurisdiction “in matters and proceedings in bankruptcy.” Such a consequence was never designed by the Act, which, by the face of its various provisions, taken as a whole, contemplated a uniform system by which the property of an insolvent might be disposed of by a single court, “so as to secure the rights of all parties, and due distribution of the assets among all the creditors.” The marshalling of the different funds and assets implies their collection and retention by the court which is charged with their distribution among the creditors. If they cannot, to this end, pursue their own remedies and modes of procedure, but are subject to restriction through the process of a State court, the jurisdiction vested “in the courts of the United States of all matters and proceedings in bankruptcy” would not be “exclusive.”

Mr. Bump, in his *Law and Practice of Bankruptcy*, at page 162 (eighth edition), says:

“The property and estate of the bankrupt, so far as any interference therewith is concerned, is thereby brought *eo in-*

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stanti into the Court of Bankruptcy, and placed in its custody and under its protection as fully as if actually brought into the visible presence of the Court. Its jurisdiction is superior and exclusive in all matters arising under the statute. No court of an independent State jurisdiction can withdraw the property surrendered, or determine in any degree the manner of its disposition." At page 199, he says: "The jurisdiction of the Bankrupt Court is exclusive of the courts of the several States, extends over the bankrupt, his estate, and all parties and persons connected therewith. The estate surrendered is placed in the custody and under the protection of the Court of Bankruptcy as fully as if brought in its immediate possession, and the officer appointed to manage it is accountable to the court appointing him, and to that court alone."

Numerous cases might be cited to show that the jurisdiction of a District Court of the United States, sitting as a Court of Bankruptcy, is superior and exclusive in all matters arising under the statute; that the estate surrendered is placed in the custody of the court so sitting in bankruptcy, and the officer appointed to manage it is accountable to the court appointing him, and to that court alone, and that no court of an independent State jurisdiction can withdraw the property surrendered or determine in any degree the manner of its disposition. Of these, it is enough to refer to *In re Barrow* (1 N. B. R., 481); *In re Vogel* (2 N. B. R., 427; 7 Blatch., 13); *Pennington v. Sale & Phelan* (1 N. B. R., 572; 7 Blatch., 572); *Buckingham v. McLean* (13 How., 151); *Watson v. Citizens' Savings Bank* (11 N. B. R., 161).

The Bankrupt Act of 1841 did not confer as full and explicit powers on the District Court in its administration as are granted by that of 1867. Mr. Justice Story, in his able opinion in *Ex parte Christy* (3 How., 292), in which the powers of the said court under the Act of 1841 are brought into examination, elaborately reviews the whole subject, and his learned argument fully sustains the conclusions which he reaches as to the controlling powers of such courts in the collection of the assets of the bankrupt, with a view to a speedy close of the

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proceedings in such cases by the national machinery, which is adequate to all the exigencies of the Act.

But, independent of the relation which the State and United States courts maintain to each other under the Bankrupt Act, another principle intervenes which forbids any control by the State courts over the assets of the said bank now in the hands of its trustees. Where a court, in the exercise of a competent jurisdiction, takes possession of assets and places them in the hands of its appointee, they are held by him as the officer of the court, to be administered only by its order. They are in possession of the court, and remain there until disposed of by its direction. No other court can rightfully interfere with assets thus held. The officer is amenable to the court for this safe custody, of which he cannot be dispossessed by the act of any other tribunal. His possession, like that of a receiver, is the possession of the court, and process against him in regard to them would be process against the authority which appointed him, "and a court will not allow itself to be made a party in another court." (*Angel v. Smith*, 9 Ves., Jr., 335; *Johnes v. Claughton*, Jacob, 573; *Parker v. Browning*, 8 Paige, 388.) In *Peale v. Phipps* (14 How., 368), the charter of a bank was adjudged forfeited by the laws of Mississippi, and a trustee appointed by the Circuit Court of that State for the purpose of collecting its assets. A petition was filed in the Circuit Court of the United States for rent due and compensation for injuries to certain real estate, which the plaintiff had previously recovered from the bank, and of which they were in possession. The trustee filed exceptions, one of which was that he had been appointed by the Circuit Court of Mississippi for the purpose of collecting the assets of the said bank, and was not amenable to any court but the one which had appointed him. The Circuit Court of the United States overruled the exception, and its judgment was reversed by the Supreme Court. Chief Justice Taney, delivering the opinion of the court, said: "We see no ground upon which the jurisdiction of the court can be sustained. The plaintiff in error held the assets of the bank as the agent and receiver of the

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Court of Adams County, and subject to its order, and was not authorized to dispose of the assets, or to pay any debts due from the bank except by the order of the court. The property in legal contemplation was in the custody of the court of which he was the officer, and had been placed there by the laws of Mississippi; and while it thus remained in the custody of the court, awaiting its order and decision, no other court had a right to interfere with it, or to wrest it from the hands of its agents, and thereby put it out of his power to perform his duty." The judgment of the court was in conformity with *Wiswall v. Sampson* (14 How., 52), decided at the same term. In *Freeman v. Howe* (24 How., 450), it was held "that the possession of the marshal was the possession of the court, and that, pending the litigation, no other court of merely concurrent jurisdiction could be permitted to disturb that possession." It by no means follows, as is contended on the part of the appellee, that because the assignee or trustee may have the aid of the State courts for the collection of the debts which he holds by virtue of his appointment, he is amenable to the control of such courts, in regard to the management of the assets entrusted to his care by the court under whose authority he holds them. It is true, "if the aid of the State court is demanded by an assignee to recover property, he must submit to the terms prescribed, and recover or not, as the principles of law and equity bearing on the rights of the contesting party demand. He is estopped in such "a case to deny the jurisdiction of the State Court to decide the merits of the controversy. (*Pindell v. Vimont*, 14 B. Mon., 400.) But its right to determine a controversy thus voluntarily submitted to its judgment by an assignee does not confer the power to interfere with the assets in his hands, not drawn in question by the issues submitted to it. "The assignee can properly institute a suit in a State court only under the direction of the District Court. (*Chemung Canal Bank v. Judson*, 8 N. Y., 254.) And where he does submit one, it is always supposed to be by its permission, for, even after institution, it may compel its discontinuance.

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The right of the assignee to entertain a suit in the State courts in regard to the assets of the bankrupt does not imply a correlative liability to be enjoined by the process of the said courts from their collection. Where he claims as plaintiff, he is in the execution of a duty imposed by the act; but if as a defendant, he can be controlled by the process of the State courts, the administration of the assets may be withdrawn entirely from the court entrusted with it by the statute and transferred to a jurisdiction not within its intention or design. By one of the provisions of the act, the assignee may, if he requires it, be admitted in his own name to prosecute an action pending at the time of the commencement of the proceedings in the name of the bankrupt, for the recovery of a debt or other things which might or ought to pass to the assignee by the assignment; and if any suit at law or in equity, in which the bankrupt is a party in his own name, is then pending, the assignee may defend the same with like effect as it might have been defended by the bankrupt. Mr. Bump, in his treatise, 137, says: "The power of State courts to proceed with pending suits is thus, under certain prescribed limits, recognized by the statute itself." But even this provision is not compulsory on the assignee. In the opinion of the court in *Traders' National Bank v. Campbell* (6 N. B. R., 365; 14 Wall., 87), Mr. Justice Miller says: "It is said that the assignee should have applied to the State court for an order on the sheriff to pay over the proceeds of the execution to him. But it cannot be maintained that the assignee who is pursuing the assets of the bankrupt in the hands of third parties is bound to resort to the State courts because there is a litigation there pending. The language of the 16th section, that the assignee may prosecute and defend all suits pending at the time of the adjudication of bankruptcy, in which the bankrupt is a party, does not *oblige* him to seek a remedy in that way."

So, even where the assignee may prosecute or defend a suit pending at the time of adjudication, brought by or against the bankrupt, he is not compelled to resort to the State courts thus having cognizance of the action and abide by its judgment,

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but may apply directly for relief to the District or Circuit Court, as the character of his case may require.

It would seem to follow, as a legitimate and necessary consequence, that if, under the statute, the State courts are not permitted to retain cognizance of causes pending against the bankrupt in regard to his property at the time when he is so adjudged without the consent of his assignee to become a party thereto, they would be without jurisdiction to compel him by their process to appear as a defendant in suits brought to affect the assets entrusted to his charge by the District Court.

His position would indeed be anomalous, if he cannot be made a party to a suit pending in a State court against the bankrupt in relation to his estate, that he may be brought into the same court by original process issued against himself in regard to the same subject matter. Such consequences are too contradictory to be legitimate results of the statute. While the State courts must be permitted to administer their functions to the full extent provided by the Constitution, to which they owe their origin, without encroachment, the lines which separate them from the jurisdiction of the Federal courts must be duly regarded and respected. An infringement of the powers of either would only lead to a conflict which would impair both their dignity and usefulness.

The motion to reverse the order overruling the demurrer is granted, and the complaint dismissed.

WRIGHT, and WILLARD, A. JJ., concurred.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

Upon the bankruptcy of a depositor, his deposit becomes a security for the payment of his indebtedness to the bank.

Such deposit should be set off against the aggregate debt of the bank, not including any notes upon which the bankrupt is surety, unless the principals are insolvent.

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A bankrupt in a composition case in which no assignee has been appointed stands in the position of an assignee in respect to set-off.

Semble, That if the bank holds mere contingent debts or liabilities, or a claim for unliquidated damages arising upon contract, it may retain the deposit until the amount of its provable debt can be ascertained, and may then use it as a set-off.

*Ex parte HOWARD NATIONAL BANK. In re C.
H. NORTH & CO.*

C. H. NORTH & Co. having failed, filed their petition in bankruptcy in March, 1876, and soon after offered a composition of fifty per cent., which was accepted and recorded in April. Upon their schedules were several notes signed by various persons and indorsed by the bankrupts, and other notes signed by the bankrupts and indorsed by sundry persons, which had been discounted by the Howard National Bank of Boston, of which some were overdue before the composition was effected, and some were not yet payable. The bank had about two thousand dollars of the money of North & Co. on deposit. When the composition was recorded, the bankrupts, together with the several parties respectively liable on certain of the notes, went to the bank and took up the paper, nothing being said about the deposit. Afterwards the bank claimed the right to apply the deposit upon a note signed by D. M. Oliver & Co., and indorsed by North & Co., which came due in May; and the latter insisted that the credit should be given on an earlier note signed by J. N. Tryon, and indorsed by the bankrupts, which was overdue when the composition was made. This question was submitted to the court on the foregoing facts.

N. Morse, for the debtors, contended that they had the first right of appropriation, as in case of payment of money by a debtor to his creditor; that the bank had the next right, but that as nothing was done about it up to the time of the composition, the deposit should be applied to the debt which came due the earliest.

H. D. Hyde, for the bank, argued that it was like collateral security which the holder may appropriate in the mode most beneficial to himself.

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LOWELL, J.—This deposit, though it operates as security and as payment, was not intended for either, but is made so by the bankruptcy of the debtor; the law being unwilling that the bank should be called on to pay its debt to the assignee in full, and receive only a dividend on the debt due from the bankrupt. I have been referred to no decision which approaches this case, and have not had time for a thorough examination, though I venture to think I should know of some of the cases if there were many.

It would be easy to put a variety of supposed cases in which the assignee or the bank might be thought to have equities on the one side or the other, and I have exercised my mind somewhat in that direction; but on the whole I have come back to the language of the statute, and find the simplest way the best. The statute says that, in all cases of mutual debts or mutual credits between the bankrupt and a creditor, the account between them shall be stated, and one debt be set off against the other, and the balance only be allowed or paid, as the case may be. In bankruptcy, all debts are to be liquidated as of one and the same day; and the reason for applying a payment on the first debt rather than the second ceases, for the reason is the presumption that a debtor intends to begin at the beginning. There is no beginning nor end to debts in bankruptcy, excepting that they must be debts, or be capable of liquidation at some time before the case is closed. There can be no doubt, for instance, that if the bank held mere contingent debts or contingent liabilities, or a claim for unliquidated damages arising by contract, the deposit must be left in their hands until it could be ascertained what their probable debts would be, if anything; and that it might then be used as a set-off.

In this state of the law, it appears to me that the credit should be set-off against the whole ultimate debt of the bank; that is to say, against the aggregate amounts of the notes of the bankrupt, in which he is the principal debtor; and as to those in which he is indorser, so far, and so far only, as is made necessary by the insolvency of the real principals. Where

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he is surety for solvent principals they must pay their own debts.

When a debtor pays money, he may dictate the mode of its application at his pleasure, for the reason that he might have withheld the payment altogether. If he gives security, he gives it for such debts as he agrees to have it applied to. If payment is made generally, or security is given without restriction, the creditor has the right of appropriation; because it is presumed that the debtor would have signified his choice if he had any, or if the security was part of the bargain, that its special application would have been cared for when the application was made. A set-off created by law to prevent injustice does not stand on the footing of a contract. The money or credit belongs to the assignee for the use of the general creditors, but the law says he shall not recover it in full, and turn the particular creditor over to a dividend. This leaves the appropriation, not to the actual or presumed intent of the parties, for there is none, but to the operation of the law of mutual credit.

I understand the practice in England to be, that a banker who has discounted notes for his customer may prove for the whole money as so much lent the customer, exhibiting a list of his notes or bills, which are called securities. Any deposit the banker has in hand would come out of this sum-total. If, however, any bill or note is paid by other parties after the proof has been admitted, its amount is to be deducted from the total debt proved. In other words, the proof is considered as made on each note or bill separately, though not so in form. (*Ex parte* Burn, 2 Rose, 55; *Ex parte* Barratt, 1 Gl. & J., 327; *Ex parte* Hornby, De Gex, 69.)

It is plain that, if it were our practice to prove in this way, we could only require such notes and bills to be struck out as were paid by the parties primarily bound to pay them; because all sureties and indorsers, and other persons in similar relation to the bankrupt, can retain the proof of the creditor against the estate of the principal debtor; and I suppose this to be the law of England too, though it has not been applied there to this precise case. The effect of such a mode of proof,

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and of such subsequent modification of it as obtains in England, would be that the set-off would practically be applied *pro rata* to the whole primary debt of the bankrupt, and to so much of the debt which he had contracted as indorser or surety for others as they were not able to meet; which is the result I have reached by a somewhat different way.

In this district it is not the law, and I suppose it is not the custom of bankers to consider the discounts as money lent, and the notes as security; but each note is treated as a separate contract, and is to be so proved in bankruptcy. This is undoubtedly the law of Massachusetts; but the law of England seems to amount to nearly the same in practice, with the important exception that the banker there can vote on his whole debt at the first meeting, while here he can vote only on the absolute debt, reserving his proof against the bankrupt as drawer or indorser until the several notes or bills shall have been dishonored—a practice which seems simple and just, and which puts a holder of notes, which he has bought in the market, on the same footing with the banker who has originally discounted them for the person who afterwards becomes bankrupt.

There is a class of cases bearing some resemblance to the present, which tend to support the rule I adopt. The several indorsers of the bankrupt's notes are considered as *quasi* sureties for him. If, therefore, they pay the notes, they can stand in the place of the bank; and they have an equity to say that any security or set-off which the creditor holds shall be duly applied toward the debt. This is admitted law. Now, in many cases where a creditor has had a surety for a specific part of his debt, and has proved the whole debt against the bankrupt principal, it has been held that he must give credit for the dividends *pro rata*, so as to relieve the surety in the proportion that the debt for which he is liable bears to the whole. This doctrine has been applied where there were several guarantors or sureties for given amounts, and to the case of accommodation acceptance, where the acceptors, having paid the bills, were subrogated to their proportion of the whole

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debt proved against the principal. I see no distinction in the doctrine, but only in the mode of its application between that case and this. Here is a sum of money which the law says shall be a payment, not of any particular part, but generally of the debt of the bank; and I think each indorser may say that he has an interest in so much of it as will be represented by the note he has indorsed compared to the whole debt. Cases involving the principle which I refer to are *Ex parte* Turner (3 Ves. Jr., 243); *Ex parte* Rushforth (10 id., 409); *In re* Plummer (1 Phillips, 56); *Hobson v. Bass* (L. R., 6 Ch., 792); *Paley v. Field* (12 Ves., 435); *Bardwell v. Lydall* (7 Bing., 489); *Gray v. Seckham* (L. R., 7 Ch., 680).

I have treated this as a case between an assignee and a creditor, because the bankrupt in a composition case stands, as to set-off, in the position of an assignee, if none has been appointed.

The credit is to be set against the aggregate debt of the bank, not including any notes upon which the bankrupt is surety, unless the principals are insolvent.

UNITED STATES CIRCUIT COURT—VERMONT.

NOVEMBER 7, 1877.

Where a certain sum is allowed by statute to be invested in a homestead, such sum may be put into an undivided part interest in a homestead, and into premises to which others hold the legal title.

An insolvent, more than four months before the commencement of proceedings in bankruptcy against him, furnished from his own property, towards building a homestead upon premises which his wife had contracted to purchase, and which were subsequently conveyed to her, the sum of fourteen hundred dollars; *Held*, That such transaction was a fraud upon his creditors, and that the assignee was entitled to a conveyance of the husband's interest in such homestead, less the amount he was authorized by law to invest in a homestead, and also to a conveyance of the balance of his interest for the benefit of creditors existing at the time of the investment.

NATHAN M. JOHNSON, Assignee, etc., v. DENNIS E. MAY and EMILY B. MAY, his wife.

WHEELER, J.—This is an appeal from a decree of the District Court in bankruptcy, and has been heard by express re-

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quest of the parties in the necessary absence of the Circuit justice and the Circuit judge, with the approval of the Circuit justice, on bill, answers, replication, proofs, and argument of counsel.

The defendants, husband and wife, built a house on land she had bargained for, at the price of four hundred and twenty-five dollars, and paid for in part from her separate means, and moved into it and occupied the premises for a homestead. Soon afterwards she paid the balance due for the land, and took a deed of it to herself.

From a careful examination of the items of the cost of the house shown in evidence, which amount to three thousand and eighty-three dollars and thirty-eight cents, and having regard to the testimony of witnesses who have examined it since it was built, and estimated its cost and testified to the estimates, and to the liability to overlook items, probably nearly five hundred dollars should be added to which, in arriving at the true amount, the whole cost of the land and house is found to be four thousand dollars.

Of this cost she furnished, including the payment for the land, from her separate property that came to her from her father's estate, directly about nine hundred and eighty dollars.

He had received from her two hundred dollars of her separate property, under an agreement to return it to her, for which he had given her his note, and which he had in his hands at the time.

He borrowed two hundred and twenty-five dollars, and secured payment of it by a pledge of a note that was her separate property, which has been paid by the maker of the note in part payment of it, which was used about building the house.

And they raised, for the purpose of putting into the house, by a mortgage on the premises still outstanding, seven hundred dollars, and on a note of five hundred and fifty dollars, signed by both and a surety, about five hundred dollars, which note is still outstanding.

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These sums were used about building the house. The balance of the cost of the house, about one thousand four hundred dollars, he furnished from his own property that had no connection with hers.

The placing that property in the house on that land, and the conveyance of the land to her afterwards with his consent, operated to convey so much of his property to her. (*Bent v. Bent*, 44 Vt., 555.)

When he placed the property there, he was so far insolvent that he had no right to convey any of the property that could be reached by his creditors away from them to her. He did not fully realize his condition, and she was not aware of it, but as a reasonably prudent man, he ought to have known that his property could not rightfully be taken for that purpose.

The making it over to her in that manner was a fraud upon the rights of his creditors, and the title to it that she has got by it she holds as trustee for the benefit of the creditors. (*Bank U. S. v. Lee*, 13 Peters, 107; *McLane v. Johnson*, 43 Vt., 48.) She did not, however, lose any right she had to what was otherwise her own property by the transaction. (*Bank U. S. v. Lee*, *supra*.)

He has since gone into bankruptcy, individually, and as a partner with another, and the orator is the assignee. A claim for the two hundred dollars she let him have has been proved against his estate by her, and one for the two hundred and twenty-five dollars by the maker of the note who paid it, for her benefit.

This bill is brought to reach his property that went into the house, to recover it for the benefit of the estate.

It is objected in his behalf that he is not a proper party, because he has no interest, and that the bill should be dismissed as to him with costs. But the wife could not properly be sued alone. When the husband is not an adverse party, he should be joined with the wife in suits for or against her; when he is, a next friend should be. (*Porter v. Bank of Rutland*, 19 Vt., 410.) Here the wife is none the less a wife, nor he any less a husband, because he is in bankruptcy, and he is

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not an adverse party to her, and was therefore necessarily and properly joined with her.

So much of the house and land as she paid for directly with her separate property according to the laws of the State, as administered in courts of equity, which must govern as to his property in this Court as a court of equity, belongs to her as against the husband and his creditors, and of course as against the orator representing merely his creditors. (*Barron v. Barron*, 24 Vt., 375; *Clark v. Peck*, 41 Vt., 145.)

The two hundred and twenty-five dollars came indirectly, but not less actually from her separate property, and so much of the house as that paid for belongs to her in the same way and for the same reasons.

The letting him have the two hundred dollars by her did not create a debt that was like ordinary debts. After she let him have it, he had so much of her property in his hands with the mass of his. The note he gave her had no validity whatever as a note. (*Sweat v. Hall*, 8 Vt., 137; 2 Story's Eq., sec. 1370.) It was merely some evidence of the transaction, which created a trust rather than a debt. When he had put an equal or greater amount of property into the house and it had been conveyed to her, he had in effect returned the property, and if more, more with it, to her. If not, he had so much of her property in his hands, and she as much and more of his in hers, which would make like claims in favor of each against the other, that could, and under the Bankrupt Law should be set off against each other. (Rev. Stat. U. S., Section 5073.) The claims of the orator rest upon the rights of the creditors under that law. The transaction was more than four months before the proceedings in bankruptcy, and not in fraud of that law, nor was it as to that amount of the property that he put into the house fraudulent in fact as to the creditors. But it extinguished her claim against him, and of course against the estate in the hands of the assignee, on account of this money or the note given for it, and that, and the one proved for her benefit on account of the two hundred and twenty-five dollars also, should be released. These two sums make the amount of her separate property put

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into the house about one thousand four hundred dollars, and substantially equal in amount to his that he put in.

The mortgage of seven hundred dollars is unquestionably a charge upon the premises.

The loan on her note, signed by him also with surety, having been made for the purpose of being put into the house as her property, may be made so in favor of the holder of the note. (*Frary v. Booth*, 37 Vt., 78.) And probably in favor of the surety or the orator, if either should be compelled to pay it, or any part of it. The husband being in bankruptcy is not likely to pay it, but is likely to be discharged from it, and as between her and the orator it is just and equitable that it should stand as if actually made a charge upon the property, to be borne by the property.

In this view, independently of any homestead right, she would hold the legal title to the premises, subject to the mortgage and this quasi charge, one-half for herself and the other half in trust for the orator, which half he would be entitled to have conveyed to him.

But the husband had a lawful right, except as to existing creditors, to put not exceeding five hundred dollars in value into a homestead, that could not be reached by subsequent creditors. (Gen. Stat. Vt., 451, Sec. 1; 452, Sec. 7.) And he had the same right to put not exceeding that value into an undivided part interest in homestead premises, that he had to put it into a whole interest. (*McClary v. Bixby*, 36 Vt., 254; *Danforth v. Beattie*, 43 Vt., 138.) And into premises to which others held the legal title, as well as into those to which he held it. (*Morgan v. Stearns*, 41 Vt., 398.) And especially into these premises belonging to his wife, in which he would have a life estate by the curtesy, issue of the marriage being born alive. (Gen. Stat. Vt., 414, Sec. 15.)

When he put his property into these premises he and his wife had the equitable, and the man afterwards her grantor, the legal title to them. There was no deed to him of his interest, the record of which could govern as to the time of acquiring it. The deed to his wife was not a deed of it towards him, for he

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rather parted with his rights than acquired any title by that deed. The premises became impressed with the character of a homestead when he moved into the house, for then they began to be used or kept by him as such. (Gen. Stat. Vt., 451, Sec. 1; *Spaulding v. Crane*, 46 Vt., 292.) He then acquired a homestead right in the premises to the value of five hundred dollars, valid against subsequent creditors, but subject to the right to hold it of existing ones. (*Perrin v. Sargeant*, 33 Vt., 84.)

The conveyance of this homestead interest to his wife, by letting it pass by the deed to her, was not fraudulent as to the subsequent creditors, for they could never have reached it if it had remained his. (*Keyes v. Rines*, 37 Vt., 260; *Morgan v. Stearns*, 40 Vt., 398.) Nor would it have passed to the orator by the deed of assignment to him, for their benefit. (Rev. Stat. U. S., Sec. 5045.)

But the transaction by which the property passed to the wife was inoperative as to the homestead right as against existing creditors, and the orator is entitled to recover it for them, if any there are that have claims against that estate in his hands; the whole right if the claims of such creditors amounted to five hundred dollars at the time he acquired the homestead right. If not, to recover such part of it as the amount of such claims at that time is a part of five hundred dollars. The rest of the property that he put into the house, and which passed to the wife, having been put there and so passed in fraud of the rights of creditors generally, can be reached for the benefit of them generally, subsequent as well as then existing ones, there being no special exemption to apply to it. (*McLane v. Johnson*, 43 Vt., 48.)

The orator is entitled to a decree for a conveyance in the right of the wife by her and her husband, according to the statute of the State, of an undivided one-half interest in the premises, leaving the whole subject to the mortgage and to the payment of the note of five hundred and fifty dollars, to be lessened by the amount of the homestead right that is exempt from the claims of the then existing creditors.

He represents all the creditors interested in the estate, and

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is entitled to recover whatever any of them are entitled to have administered by him, and the only question here is as to what he is entitled to recover of the defendants, and not at all as to how it shall be distributed after it is recovered.

It does not appear how many, if any, nor to what, if to any, amount there are creditors whose claims existed at the time the premises became a homestead, and have been or are to be proved against the estate, therefore an account of them must be taken before a final decree can be fully made up.

The bill does not pray for any account, but it is framed for the recovery of the estate in the hands of the wife defendant, and as an account is necessary to ascertain how much she is entitled to retain, it may properly be had under these pleadings, although, ordinarily, there should be a special prayer for an accounting. (*Davis v. Smith*, 43 Vt., 269; 48 Vt., 52.)

These views as to the main question involved in the case have been submitted to the Circuit justice and are approved of by him.

The decree of the District Court is reversed, and let a decree be entered that the cause be referred to John L. Edwards, Esquire, Special Master, to take an account of the debts, if any, proved or to be proved against the estate of Dennis E. May, in the hands of the orator as assignee thereof in bankruptcy, that existed when he commenced to occupy the premises in question as a homestead, and make report thereof; and on the coming in of his report, if it shall appear therefrom that such debts then amounted to five hundred dollars, that then the defendants in the right of the wife defendant, within thirty days, convey to the orator an undivided half of the premises, leaving the whole subject to the payment of the mortgage thereon and the note of five hundred and fifty dollars signed by the defendants, with surety, as if the whole payment thereof were charged thereon; and in case such debts amounted to less than five hundred dollars, that the defendants likewise convey that same interest, lessened by such proportion thereof as the deficiency bears to fourteen hundred dollars; and that they release all claims against said estate in favor or for the benefit of the wife

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defendant on account of the sum of two hundred dollars she let the husband have, and payment of the sum of two hundred and twenty-five dollars borrowed by him out of her note.

With costs of this suit to the time of the decree in the District Court to the orator, and costs of the appeal there and in this court to the defendants.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

MAY, 1877.

The holder of a note or bill may prove it in full against the party primarily liable upon it, notwithstanding he may have received a part or all of it from a surety or *quasi* surety.

C., a manufacturer, consigned goods to his factors, who advanced their notes to an amount much beyond what was ultimately realized on the goods. Both parties failed, and the factors, employing the goods then in their possession, made a composition of forty per cent. with their creditors, including the holders of the notes who reserved the right to prove in full against all other parties to them; *Held*, That these creditors, proving against C., need not give credit for the full amount received by them on the composition, but must abate their proof by giving credit for the property of C. so employed by the factors.

Where notes were exchanged, and the holder has received a payment from the maker, he can only prove for the balance against the indorser.

Debts are to be considered proved when they are duly authenticated and sent to the assignee or register.

Ex parte HARRIS, CHIPMAN & CO. In re JOHN COCHRANE, JR.

John Cochrane, Jr., the bankrupt, was a manufacturer of carpets, and Harris, Chipman & Co. were his selling agents or factors, and advanced him their notes from time to time, which he indorsed and procured to be discounted. Both parties failed, at which time there were outstanding, in the hands of several banks and individuals, notes of this kind for about one hundred and sixteen thousand dollars; and the factors had goods of Cochrane's to the value of about twenty-six thousand dollars. Harris, Chipman & Co. went into bankruptcy March 7, 1876, and offered a composition of forty per

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cent., which was accepted and recorded April 29, 1876. The several holders of the notes received the forty per cent., and gave Harris, Chipman & Co. a covenant not to sue them, reserving the right to prove the full amount of the notes against the other parties to them.

Cochrane went into bankruptcy March 30, 1876. The question now came up, whether the holders of the notes could prove in full, or for what other amount, against the assets of Cochrane. A proof in full had been made, and afterwards modified, by order of the register, by deducting the amount paid in composition by Harris, Chipman & Co.; and the petition now was for a revision of this order. The affidavit for proof against Cochrane's estate had been made and sent to the assignee, or to the register, very near the time that the resolutions of Harris, Chipman & Co. were recorded.

W. Munroe, for the assignees of Cochrane.

F. S. Hesseltime, for Harris, Chipman & Co.

J. B. Bullard and *C. K. Fay*, for holders of notes.

LOWELL, J.—In so far as the notes offered for proof were given for the accommodation of Cochrane, it is immaterial whether payments by the parties who stood in the relation of sureties were made before or after the proof was made in this case, because it is held under our Bankrupt Law, by a great preponderance of authority, and upon unanswerable reasoning, that the holder of a bill or note may prove it in full against the party primarily liable upon it, notwithstanding he may have received a part or all of the amount from a surety or *quasi* surety. (See *Ex parte Talcott*, 9 N. B. R., 502; 2 Lowell, 320.) Of course the parties dealing together can agree that the creditor shall not have this right, but that it shall belong to the surety, in consideration of his payment; yet even then the course would be for the creditor to prove his note or bill in full, and to give to the surety his proportionate part of the dividends that might be received from the estate of the principal debtor. Here the agreement was that the

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holder should prove in full against the estate of Cochrane, and any other parties to the notes. But were these notes given for the accommodation of Cochrane? I think they may be so regarded in equity, to the extent that they were not secured by goods, and the proceeds of goods, in the hands of Harris, Chipman & Co. If the latter had taken up their notes, they would be creditors of Cochrane for ninety thousand dollars. When both parties failed, the goods and their proceeds were applicable to the notes drawn against them, so far as they would go; and this equity might have been enforced by the holders, under the doctrine of *Ex parte Waring* (19 Ves. Jr., 345), and that class of cases as applied in this country.

It is a question not so clear, whether the holders of the notes or bills, having the right to an appropriation of funds in the hands of a surety, can prove against the principal in full. I have said on one occasion that they cannot, and I have not found any reason to change my opinion. I do not mean to say they might not prove in full by expressly or impliedly renouncing their security; but that is impossible in this case, because the factors have appropriated the security, as they had a right to do, if the creditor did not object; but the result is that twenty-six thousand dollars of Cochrane's property has gone to pay the debts of Harris, Chipman & Co., and to this extent I think the general creditors of Cochrane have a right to say that the holders of the notes shall not prove in full against Cochrane's assets. If the whole amount of these notes outstanding and offered for proof is one hundred and sixteen thousand dollars, each must be reduced in the proportion of ninety thousand dollars to one hundred and sixteen thousand dollars.

There was one debt which presented a different question. Cochrane had exchanged notes with one Pearce, and the latter had paid thirty-five per cent. upon all his debts, by some sort of composition. I do not understand that in exchanging notes either party is considered to be accommodating the other; each impliedly undertakes to pay his own notes in consideration of the exchanged note which is to be paid by the other.

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In this case, credit must be given by the holder of a note coming in to prove against Cochrane's estate, as indorser, for whatever dividend he has received, or might have received, from Pearce, as maker, before he offered his proof against the assets of the indorser, though not bound to give such credit where Cochrane is promissor. Under our practice, I think a debt is to be considered as proved when it is duly authenticated and sent to the assignee or the register, because ninety-nine in a hundred of all debts not proved at the first meeting are proved in this way. I do not think the date should depend on when the assignee or the register makes a formal entry of its allowance, provided the debts turn out to be just and true.

UNITED STATES DISTRICT COURT—CALIFORNIA.

NOVEMBER 22, 1877.

Where one party agrees to furnish goods to another at a fixed price, the latter to pay all freight, storage and charges, and to pay at the end of every three months for the goods sold by him within that time, and to pay at the end of the year for all goods remaining unsold, the proceeds of the goods sold by the latter cannot be recovered from his assignee in bankruptcy.

Such arrangement does not create the relation of principal and agent or factor, but that of buyer and seller.

In re LINFORTH, KELLOGG & CO., Ex parte THE FURST & BRADLEY MANUFACTURING CO.

THE petition in this case prayed that the court would order the assignees of the above bankrupts to pay to the petitioner certain moneys in their hands, being the proceeds of goods heretofore sold by the bankrupts, and also turn over certain notes and accounts for the unpaid purchase-moneys of other goods sold by them. No objection is made to the form of the proceeding.

The goods were obtained by the bankrupts, from the petitioner, under the following agreement :

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“Memorandum of agreement made this first day of June, 1876, by and between the Furst & Bradley Manufacturing Company of Chicago, Illinois, parties of the first part, and Messrs. Linforth, Kellogg & Co., of San Francisco, California, parties of the second part,

Witnesseth: That the said parties of the first part agree to furnish to the said parties of the second part such goods of their manufacture as they may, from time to time, order, delivered free on board cars in Chicago, Illinois, on the following terms and conditions, viz.: The Furst & Bradley Manufacturing Co. agree to allow Messrs. Linforth, Kellogg & Co. the following discounts from their present price-lists, dated Chicago, 1876, which are hereto attached.

On Sulky Rakes a discount of..... $33\frac{1}{2}$ per cent.

On Wheel Cultivators, a discount of..... $33\frac{1}{2}$ per cent.

On Sulky Plows, a discount of..... $33\frac{1}{2}$ per cent.

On Texas or Southern Plows, a discount of.25 per cent.

On Common Plows and other goods..... $33\frac{1}{2}$ per cent.

And further agree to give the said parties of the second part the exclusive sale of such goods as they may order, in sufficient quantities to supply the demand in the following described territory, to wit: The State of California, the State of Nevada, as far east as Elko—but not to include that place or tributary trade—the Territory of Arizona, and the Republic of Mexico.

The said parties of the second part agree to pay all freights, storage, and other charges, on the goods shipped to them by the said parties of the first part, and to sell no other goods of the same class than those manufactured by the Furst & Bradley Manufacturing Co., in the territory above named, and further agree to keep insured at all times, at their own cost and expense, such goods as they may have in store or warehouse, at the full list price, less $33\frac{1}{2}$ per cent., for the sole benefit of the Furst & Bradley Manufacturing Co.

The parties of the second part further agree to render an account of sales every three months, beginning with September 1, 1876, and to settle for all goods sold or shipped from their warehouse or store, by giving their note, payable in sixty days

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from the dates fixed for rendering accounts of sales, as provided.

It is further agreed, on the part of Messrs. Linforth, Kellogg & Co., to settle for such goods as may be on hand June 1, 1877, by giving their note, with interest at the rate of ten per cent. per annum, payable in six months, from June 1, 1877, if so required by F. & B. Manufacturing Co. The Furst & Bradley Manufacturing Co. further agree to allow an additional discount of one per cent. per month for all cash paid in advance of the times specified above. This agreement to go into effect June 1, 1876, and to continue during the year and up to June 1, 1877.

FURST & BRADLEY MANUFACTURING CO.

LINFORTH, KELLOGG & CO."

E. B. & I. W. Mastick, for petitioner.

Henry C. Hyde, Wilson & Wilson, for assignees.

HOFFMAN, J.—In the case of *T. F. Nutter v. J. L. Wheeler* (2 Lowell, 346), Mr. J. Lowell observes: "It has been settled for a very long time that upon the bankruptcy of a factor, his principal may recover of the assignees any of the goods remaining unsold, or any proceeds of such goods which the assignees themselves have received, or which remain specifically distinguishable from the mass of the bankrupt's property. The action may be brought at law as well as in equity, subject, of course, to the factor's lien for advances or commissions—and it makes no difference that the factor acted under a *del credere* commission, or sold the goods in his own name." For these positions, which are substantially those maintained by the counsel for the petitioners in the case at bar, the learned judge cites numerous authorities. I do not understand them to be controverted by the counsel for the assignees.

But the question presented in this case is not as to the rights of the assignee of a bankrupt factor as against the principal, but whether the relation of principal and factor existed as to the goods in question, or their proceeds, between the petitioner and the bankrupt.

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The same question arose under very similar circumstances in the case before Mr. J. Lowell, and it is discussed by him with characteristic vigor, clearness, and learning.

In that case it appeared that the defendants were in the habit of sending their manufactured goods to Gear, the bankrupt, and he sold them at such prices and to such persons, and on such terms as he pleased, not less than the trade prices fixed by the defendants. Whenever he sold any tools, and not before, he was to pay the defendants in thirty days the prices shown on the list, less an agreed discount. The defendant had the right to sell any goods which remained in his shop unsold, and he was permitted to sell any of their goods at the factory, and the defendant would then deliver them according to his order, and charge him with the trade price, less the discount. Instead of paying in thirty days, Gear would sometimes give his note for the balance due, and the defendants held one such note at the time of the bankruptcy.

On this state of facts Mr. J. Lowell held that the goods sent to the bankrupt, by the defendants, remained the property of the latter until sold, and that when a sale occurred the bankrupt became their debtor at a fixed price, and was bound to pay at a definite time, and that the relation of the bankrupt to the consignor was that of a bailee, with power to sell as principal, but not that of agent or factor.

The authority chiefly relied on by Mr. J. Lowell is *Ex parte White* (L. R., 6 Ch., 397.) In that case the Court, in its opinion, describes the bargain between the parties as disclosed by their course of dealing, as follows :

“ We will give you the goods ; you shall be the sole person whom we supply in a particular district, and we shall not call upon you to pay until you have disposed of them. You are at liberty to sell upon your own terms. We have nothing to do with the persons with whom you deal, but we look to you to pay at our trade prices for the goods you sell. You must return the sales you have made up to certain times. We will give you a certain credit, but when that is expired we look to you for the cash.”

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Under this agreement the court held that no relation of principal and agent subsisted between the parties; that the consignee of the goods was not acting in a fiduciary capacity, and that the proceeds of sales were his own moneys, and he was at liberty to deal with them as he pleased, and that the consignors of the goods had no right to follow them in the hands of bankers to whom they had been paid.

It will be noticed that this case is almost identical with the case at bar. By the agreement between the bankrupts and the petitioners, the latter agreed to "furnish" the bankrupts goods of their manufacture, at a fixed price. The bankrupts were to pay all freight, storage and charges on the goods shipped to them. They had the right to sell or dispose of them in any manner, and for such prices and on such terms as they chose, and were to pay, at the expiration of three months, a fixed price for all goods sold *or shipped* from their warehouse. They were not bound to render any account sales to their consignors. The agreement speaks, it is true, of an account sales to be rendered by the bankrupts; but this evidently means an account or statement of the articles sold or shipped from their warehouse, for which they were to pay the agreed price every three months. They were not bound to render any account of the prices obtained by them, or of the terms of sale. At the end of the year they were bound to pay, if required, for all goods remaining on hand.

It is plain that this transaction in no degree resembles a consignment by a principal to a factor of goods to be sold on commission. It is a consignment of goods to be paid for at a price agreed upon, and which bore no relation to the prices at which the consignees might sell, or the amounts they might be able to collect.

A credit was given, but all goods sold or removed were to be paid for at stipulated periods, and all goods remaining on hand were to be paid for at the expiration of a year from the date of the agreement.

The transaction was thus a sale on credit, and the petitioners can make no claim to the goods sold or removed from their warehouse by the bankrupts, or to their proceeds. The

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case is not affected by the circumstance that the bankrupts have, in pursuance of their agreement, given their notes for the goods sold by them, which notes the petitioners now hold. The latter may, if they choose, surrender these notes, and prove for the original debt.

No question is made as to the goods remaining in the bankrupts' possession at the time of the bankruptcy. It is understood that the assignee has agreed to relinquish them to the petitioners, as it was found more advantageous to the estate to reduce the amount of the petitioners' claim by the amount of their contract price than to sell them at the present market rates, and admit the petitioners to prove for their whole claim.

As the assignee is in possession of all the assets to which the petition lays claim, no order will be necessary, except to deny the prayer of the petition.

UNITED STATES SUPREME COURT.

NOVEMBER 19, 1877.

In an action brought against a party who appears upon the books of a corporation as a stockholder, to recover the amount of an assessment upon stock apparently held by him, the burden of proof is upon defendant, to show that he is not a stockholder.

Bankruptcy proceedings are matters of record, but are not required to be recorded at large; they are filed and numbered, and a short memorandum kept in books provided for that purpose in the office of the clerk. Copies of such records, duly certified by the clerk, under the seal of the court, are in all cases and in all courts of the country *prima facie* evidence of the facts stated therein.

JOHN TURNBULL, JR., v. JOSEPH R. PAYSON,
Assignee of The Republic Insurance Company of Chicago.

ERROR to the Circuit Court of the United States for the District of Maryland.

Edward Otis Hinckley, for plaintiff in error.

Tenneys, Flower & Abercrombie, for defendants.

CLIFFORD, J.—Stockholders in the bankrupt company were made liable by the act of incorporation “in all cases of losses

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exceeding the means of the corporation," each to the amount of the stock which he held, and the record shows that the defendant, at the time of the alleged loss, held fifty shares of the stock, eighty per cent. of which was unpaid.

Sufficient also appears to show that the insurance company, on the ninth of October, 1871, met with losses by fire which exhausted all their funds and effects, and that the corporation, on the 14th of November of the next year, was duly adjudged bankrupt by the District Court for the Northern District of Illinois, the insurance company having its principal place of business at Chicago, in that district.

Due notice was given of the adjudication, and the creditors at their first meeting chose the plaintiff below the assignee of the estate and effects of the bankrupt company. No opposing interest appearing, the register, by an instrument under his hand, assigned and conveyed to the assignee all the estate, real and personal, of the bankrupt company.

Regular proceedings followed, and the Bankrupt Court, on the fourth of February, 1873, entered a decree that a call or assessment of sixty per cent. upon the stock of the stockholders was necessary for the purpose of raising funds to pay losses incurred by the bankrupt company in its insurance business, and ordered and directed the assignee to proceed to make the assessment.

Pursuant to that decree the assignee made the assessment, and filed in the Bankrupt Court due proof that he had given the notice prescribed in the decree. Payment being refused by the defendant, the plaintiff instituted the present suit in the District Court for the District of Maryland to recover the amount of the assessment on the fifty shares held by the defendant. Service was made and the defendant appeared and pleaded that he never promised. Other proceedings took place, which it is not necessary to notice, and at the next term the parties went to trial, and the verdict and judgment were in favor of the plaintiff. Exceptions were duly taken by the defendant, and he sued out a writ of error and removed the cause into the Circuit Court, where the parties were again

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heard, and the Circuit Court affirmed the decree of the District Court.

Cases of the kind may be re-examined here as well as in the Circuit Court upon the bill of exceptions filed in the District Court, and the defendant accordingly sued out a writ of error and removed the cause here for re-examination.

Nine bills of exception are set forth in the transcript, covering forty-eight pages of the same, all of which were allowed in the District Court. Bills of exception are required in order that the matters to which they relate may be made a part of the record, and that it may appear that the questions involved were raised in the subordinate court. Such a proceeding constitutes a proper foundation for a writ of error, but it does not remove the cause into the Appellate Court without a writ of error; and whenever a cause is removed into this court, the requirement is that there shall be an assignment of errors, setting "out separately and specifically each error asserted and intended to be urged," and "when the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be the instruction given or instruction refused." Argument to show that the assignment of errors in this cause is not a compliance with that rule is unnecessary, as it is obvious that it is materially defective, both in form and substance.

Three errors are set forth in a single assignment: 1. That the court erred by admitting in evidence the several matters set forth in exceptions Nos. 1 to 8. 2. That the court erred in rejecting the prayers for instruction presented by the plaintiff, Nos. 1 to 9. 3. That the court erred in the instruction given to the jury, which covered the whole case.

Assignments of error are required to be more specific and definite, but inasmuch as the defendant has reduced the several exceptions to a summary statement, the *material* questions will be re-examined.

Two principal allegations were required to be proved by the plaintiff, in order to maintain the action, which was assumpsit to recover the assessment made by the order of the Bankrupt Court: 1. That the defendant was a stockholder in the com-

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pany, and that he owned fifty shares of the capital stock. 2. That the assessment had been made by the assignee, as alleged in the declaration.

During the trial the plaintiff offered evidence to prove that the defendant was a stockholder, as follows: 1. He offered the books of the corporation, in which the name of the defendant was entered as the owner of fifty shares. 2. He offered the stock-book of the company, with a duplicate of the stock certificate issued to the defendant, showing that he was the owner of the same number of the shares of the capital stock. 3. He introduced testimony to prove that the certificate was sent to the agents of the company to be delivered to the defendant when he paid twenty per cent. of the shares, and that he made the required payment. 4. He also introduced a receipt signed by the defendant, showing that the company paid the defendant a dividend upon his stock.

Separate objection was made by the defendant to each of the offers of proof, which were admitted by the Court, and the defendant accepted.

Taken as a whole, it is clear that the evidence offered was amply sufficient to warrant the jury in finding that the defendant was a stockholder as alleged. Where the name of an individual appears on the stock-book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock, in a case where there is nothing to rebut that presumption, and in an action against him as a stockholder the burden of proving that he is not a stockholder or of rebutting that presumption is cast upon the defendant. (*Hoagland v. Bell*, 36 Barb., 57; *Turnpike Road v. Van Ness*, 2 Cranch C. C., 449; *Mudgett v. Horrell*, 33 Cal., 25; *Coffin v. Collins*, 17 Me., 440; *Merrill v. Walker*, 24 Id., 237; *Plank Road v. Rice*, 7 Barb., 157.)

Specific objection was also made to the admissibility of the act of incorporation of the company, on account of a verbal variance between the name of the company as given in the act from that set forth in the declaration, but the objection is without merit, as it presents no obstacle to a right understanding

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of the matter. (*Dodge v. Barnes*, 31 Me., 290; *Chadsey v. McCreery*, 27 Ill., 253; *Ken. Seminary v. Wallace*, 15 B. Monr., 35.)

Satisfactory proof having been exhibited that the company was duly incorporated and organized, it follows that the receipt of a dividend upon the shares standing upon the book of the company in the name of the defendant, when taken in connection with the other evidence introduced by the plaintiff, is conclusive to show that the assignment of error in that regard should be overruled. (*Upton v. Hunsbrough*, 10 N. B. R., 368. *In re Bank*, 22 N. Y., 9; *Adler v. Brick Mfg. Co.*, 13 Wis., 57; *Ward v. Manf. Co.*, 16 Conn., 593.)

Suppose that is so, still it is insisted by the defendant that the court below erred in admitting the record of the bankrupt proceedings in the Bankrupt Court for the Northern District of Illinois. Several objections were taken to the admissibility of that record, the principal one of which was that the copy of the record was not properly authenticated.

Proceedings in bankruptcy are deemed to be matters of record, but they are not required to be recorded at large. Instead of that, the requirement is that they shall be filed, kept and numbered in the office of the clerk of the court, a short memorandum thereof being kept in books provided for the purpose; and the express provision of the act of Congress is that "copies of such records, duly certified under the seal of the court, shall in all cases be *prima facie* evidence of the facts therein stated." (14 Stat. at Large, 535; Rev. Stats., Sec. 4,992.)

Records and the judicial proceedings of the courts of any State, the act of Congress provides, shall be proved or admitted in evidence in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. (1 Stat. at Large, 122; *Mills v. Duryee*, 7 Cranch, 481; *Christmas v. Russell*, 5 Wall., 290.)

Both the Constitution and the act of Congress are limited in terms to the records and judicial proceedings of the State

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courts. Much discussion of that proposition is unnecessary, as it has long since been established by judicial decisions of high authority. (*Adams v. Way*, 33 Conn., 419; Conk. Treat. (5th ed.), 393; *Pepoon v. Jenkins*, 2 Johns. Cas., 119; *Williams v. Wilkes*, 14 Penn. St., 228.)

Beyond all doubt the certificate of the clerk and the seal of the court is a sufficient authentication of the record of a judgment rendered in a State Court when offered in evidence in the Circuit Court sitting within the same State where the judgment was rendered. (*Mewster v. Spalding*, 6 McLean, 24.) *Held*, also, that such an authentication would be sufficient in the State Court; and if so, that it would also be good in the Circuit Court.

Article 4, Sec. 1 of the Constitution provides that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and that Congress may by general laws prescribe the manner in which such records shall be proved and the effect thereof. Congress has exercised that power and provided in effect that they shall be authenticated by the attestation of the clerk under the seal of the court, with the certificate of the judge that the attestation is in due form. (*Bissell v. Briggs*, 9 Mass., 462; *Bank v. Beaton*, 7 Gill & J., 430).

Records of State Courts, in order that they may be admissible in the courts of other States, must be authenticated as required in that provision, but the act of Congress does not apply to the courts of the United States, nor to the public acts, records, or judicial proceedings of a State Court to be used as evidence in another court of the same State. Conclusive support to that proposition is found in many decided cases in addition to those to which reference has already been made. (*Jenkins v. Kinsley*, 3 John. Cas., 474; *Adams v. Lisher*, 3 Blackf., 241; *Murray v. Marsh*, 2 Hayw., 290.)

Circuit and District Courts of the United States certainly cannot be considered as foreign in any sense of the term either in respect to the State Courts in which they sit, or as respects the Circuit or District Court of another circuit or district. On

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the contrary, they are domestic tribunals whose proceedings all other courts of the country are bound to respect, when authenticated by the certificate of the clerk under the seal of the court, the rule being that the Circuit Court of one circuit, or the District Court of one district is presumed to know the seal of the Circuit or District Court of another circuit or district, in the same manner as each court within a State is presumed to know and recognize the seal of any other court within the same State. (*Womack v. Dearman*, 7 Porter (Ala.), 513.)

Attempt was made in the Supreme Court of Massachusetts to exclude the record of a conviction in the Criminal Court, upon the ground that it was not duly authenticated, it appearing that it was certified by the clerk under the seal of the court without the certificate of the chief justice; but the Supreme Court held, Shaw, C. J., giving the opinion, that the copy of the proceedings of any court of record in that State, certified to be a true copy of the record of such court by the clerk of such court, under the seal thereof, is competent evidence of the existence of such record in every other judicial tribunal in the Commonwealth. (*Com. v. Phillips*, 11 Pick., 28.) Since that time it has been held by that court that it is not necessary, in order to render a copy of a record of a court in that State competent evidence in another court of the State, that it should be an exemplified copy under the seal of the court, if it is duly certified by the clerk as a true copy of the record. (*Chamberlin v. Ball*, 15 Gray, 352; *Ladd v. Blunt*, 4 Mass., 402.)

Three-quarters of a century ago it was decided by the Supreme Court of New York, that a record of a judgment rendered in the Circuit Court of the United States for the District of Massachusetts was admissible in evidence, it appearing that it was authenticated in the ordinary method practised in the courts of that commonwealth, and they placed their decision upon two grounds: 1. That the record was the record of a Federal Court. 2. That the act of Congress requiring exemplification did not apply in such a case. (*Jenkins v. Kinsley*, Coleman & Caines' Cas., 136.)

Viewed in the light of these authorities, to which many more

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might be added, we are all of the opinion with the Supreme Court of Connecticut, that it is not absolutely necessary that the record of a judgment should be authenticated in the mode prescribed by the act of Congress referred to, to render the same admissible in the courts of the United States; that the District Court of the United States, even out of the State composing the district, is to be regarded as a domestic and not a foreign court, and that the records of such a court may be proved by the certificate of the clerk under the seal of the court, without the certificate of the judge that the attestation is in due form. (*Adams v. Way*, 33 Conn., 419; *Michener v. Payson*, 13 N. B. R., 49; *Mason v. Lawrason*, 1 Cranch C. C., 190.)

Bankruptcy proceedings are in all cases deemed matters of record and are to be carefully filed and numbered, but they are not required to be recorded at large. Short memoranda of the same shall be made in books provided for the purpose and kept in the office of the clerk, and the provision is that the books shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be *prima facie* evidence of the facts therein stated. (14 Stat. at Large, 536.)

Suffice it to say that the records of the bankruptcy proceedings admitted in evidence by the court below were authenticated in exact conformity with the directions of the Bankrupt Act, and were, in the judgment of the court, properly admitted in evidence, which is all that need be said in response to the fifth exception.

Exceptions were also taken to the rulings of the court in refusing to instruct the jury as requested by the defendant, and to the instruction given to the jury, but it is not necessary to give those exceptions a separate examination, for the reason that the material questions involved are substantially the same as those presented in the exceptions to the rulings of the court already sufficiently considered. Even suppose the assignment of errors presents all the questions involved in the exceptions, still it is clear that there is no error in the record.

Decree affirmed.

Ex parte Tremont Nail Company. In re Middleboro Shovel Company.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

NOVEMBER 22, 1877.

A mere promise to pay out of a particular fund, when received, the promiser retaining control of such fund, and no notice being given to the person who is to pay, creates no lien or charge upon such fund.

*Ex parte TREMONT NAIL COMPANY. In re
MIDDLEBORO SHOVEL COMPANY.*

THE bankrupts were a copartnership, carrying on business under the firm name of the Middleboro Shovel Company. On the 28th day of June, 1877, Mr. Richardson, one of the partners, happened to meet in the cars Mr. Tobey, the Treasurer of the Tremont Nail Company, and told him that he wanted to borrow about a thousand dollars to save him a journey to New York, where he could obtain it; that if the Tremont Nail Company would lend him the money, it would be repaid out of the first money received from John Dunn, of New York, for whom they were filling a large order. The loan was made, and a note for thirty days was given for it. A few days after this Mr. Richardson went to New York, and found that the agents of his firm there were embarrassed, and about to fail, or had failed. He received an advance of one thousand seven hundred dollars from Mr. Dunn, and returned to Boston on the 4th day of July, and consulted with his partner about their affairs. On the 5th of July, he saw Mr. Tobey, and told him of the failure of his agents, and that he did not know how it would affect his firm, and whether he ought to pay Mr. Tobey or not; but the conclusion reached at that time was that the firm would go on for the present. Early on Friday morning, July 6th, the money was paid to Mr. Tobey, and on the same day the firm stopped payment. Negotiations were entered into for a settlement with their creditors, in the course of which complaint was made of the payment to the petitioners, and the money was then repaid to the Middleboro Shovel Company, with an express written agreement that the repayment should not prejudice the

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rights of the petitioners, but that they should "stand in precisely the same condition in which they would have remained if the said sum of nine hundred and ninety-four dollars and ninety-two cents had not been paid to the said Tremont Nail Company upon the said 6th of July, but had been laid aside, subject to the decision of a court of law in reference to its disposal."

The Shovel Company afterwards went into bankruptcy, and the Tremont Nail Company proved a debt against their estate upon certain other notes, concerning which there was no dispute, and claimed that this note should be admitted as a privileged debt, to be paid in full. The case was heard by consent of parties upon oral evidence instead of a special case.

B. L. M. Tower, for the petitioners.

1. Security given, or payment made in pursuance of a valid and definite agreement entered into when the loan is made, is always valid, though the debtor may have become insolvent in the meantime. (*Burdick v. Jackson*, 15 N. B. R., 318, and cases there cited; *In re Jackson I. M. Co.*, 15 N. B. R., 438; *Cook v. Tullis*, 9 N. B. R., 433, 18 Wall., 332; *Ex parte Fisher*, L. R., 7 Ch., 636.)

2. The agreement gave the petitioners an equitable assignment of the money to come from Dunn. (Story Eq., Sections 973, 1044, and cases; Smith Manual Eq., p. 245; 2 Spence Eq., 860.)

3. Notice to the debtor is not essential to the valid assignment of a debt. (*U. S. v. Vaughan*, 3 Binney, 394; *Muir v. Schenck*, 3 Hill, 228; *Littlefield v. Smith*, 17 Maine, 327; *Dix v. Cobb*, 4 Mass., 508; *Warren v. Copelin*, 4 Met., 594; *Wood v. Partridge*, 11 Mass., 488.)

4. Assignment of part of a debt is good in equity. (*Morton v. Naylor*, 1 Hill, 583; *Clemson v. Davidson*, 5 Binney, 392; *Burn v. Carvalho*, 4 M. & C., 690; *Crain v. Paine*, 4 Cush., 483.)

T. K. Lothrop and *R. R. Bishop*, for the assignee, cited *Row v. Dawson* (2 Lead. Cas. Eq., 1531); *Christmas v. Russell*

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(14 Wall., 69); *Hall v. Jackson* (20 Pick., 194); *Field v. Megaw* (L. R., 4 C. P., 660); *Malcom v. Scott* (3 Hare, 39, and notes to Am. Ed.)

LOWELL, J.—The agreement of the parties seems to have interpreted the contingency which has arisen of the Shovel Company becoming bankrupts, and, I think, they intended to leave the case as it would have been if Dunn had paid his debt into court, leaving the parties to interplead upon the equitable title. In other words, that the payment should go for nothing. Virtually admitting that, considered as an ordinary payment, it would be a preference. In this I have no doubt they were wise, for the payment was made under circumstances which would warrant a jury to find accordingly, on the part of the petitioner, that they were obtaining an advantage over the other creditors, and that the debtors were probably insolvent.

The parties have acted throughout in the utmost good faith, and there is a strong moral equity, so to call it, for the petitioners; but the question is whether they had what, in equity as admitted in the courts, amounts to an assignment of part of the debt due from Dunn.

A learned judge has said that the law of equitable assignments is brought to such an exquisite degree of refinement that it is by no means easy to understand it. (*Field v. Megaw* (L. R., 4 C. P., 660), per Brett, J.); and another judge, in a case which, in one aspect, resembles the one at bar, said that the lien might depend on whether the word used was "will," or "shall," in an oral agreement collateral to a negotiable instrument. (*Thomson v. Simpson*, L. R., 5 Ch., 659.) In the case first above cited, the decision was that a promise to pay when a certain debt is received is not an equitable assignment of the debt. Two of the judges in that case intimate that a promise to pay *out of* a particular debt, or fund, would work a transfer. A like *dictum* was made by Lord Truro, in *Rodich v. Gandell* (1 De G. M. & G., 763), and this was followed by a decision of a learned vice-chancellor, afterwards lord chancellor, founding himself solely on this *dictum*. (*Riccard v. Prichard*,

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1 Kay & J., 277); but he overruled the decision of a very eminent chancellor to the contrary. (*Bradley's Case*, Ridgw. (Temp. Hardw.), 194.)

The refinement appears in this: that while an agreement to pay out of a fund is on the border line, it is held both in England and the United States, that any order or assignment, oral or written, to pay out of a particular fund, made upon the debtor or holder of the fund, or an agreement to give such an order, or a mere oral direction to go and receive the money and pay such and such debts with it, does operate as an equitable assignment. (See *Diplock v. Hammond*, 2 Sm. & G., 141; *affd.*, 5 De G. M. & G., 320; *Gurnell v. Gardner*, 4 Giffard, 626; *Hunt v. Mortimer*, 10 B. & C., 44; *Ex parte Carlon*, 4 Dea. & Ch., 120; *Bk. of U. S. v. Huth*, 4 B. Mon., 423; *Newby v. Hill*, 2 Met. (Ky.), 530; *Richardson v. Rust*, 9 Paige, 248.)

In the United States, it was held many years ago that a mere promise to pay out of a particular fund, when received, the promiser retaining control over the fund, and no notice being given to the person who is to pay it, would not work an equitable assignment. (*Rogers v. Hosack*, 18 Wend., 319.) This case was remarked upon by the Chancellor in *Richardson v. Rust* (9 Paige, 248); but it has been followed in all the cases which I have seen, and appears to be the settled law of this country. (See *Hoyt v. Story*, 3 Barb., 262; *Christmas v. Russell*, 14 Wall., 69; *Trist v. Child*, 21 Wall., 441, per Swayne, J.; *Christmas v. Griswold*, 8 Ohio St., 558; *Connely v. Harrison*, 16 La. Ann., 41; *Eib v. Martin*, 5 Leigh, 132; *Ford v. Garner*, 15 Ind., 298; *Pearce v. Roberts*, 27 Mo., 179.)

With these cases before me, I cannot hold that the agreement between these parties gave any lien or charge on Dunn's debt in favor of these petitioners, and their petition to stand as privileged creditors is denied.

In re Jonas.

UNITED STATES DISTRICT COURT—CALIFORNIA.

Any creditor whose interests are directly affected by the proceedings, may intervene and contest the allegations of the petition with regard to acts of bankruptcy, notwithstanding the debtor fails to appear on the return day.

In re J. JONAS.

IN November, 1876, a petition was filed against Jonas by creditors claiming to constitute one-fourth in number of all his creditors, and to represent one-third of his aggregate indebtedness. At the return day of the order to show cause the debtor made default, but certain creditors who had attached his property intervened in the cause and denied the jurisdictional averment with respect to the *quorum* of creditors, and also the commission of the acts of bankruptcy alleged in the petition.

The case was referred to the register to take proofs. His report shows that the petition is signed by the requisite *quorum* of creditors.

The questions argued were :

1. Whether an attaching creditor has a right to intervene after default of the debtor and contest the commission of the alleged act of bankruptcy.
2. Whether the proofs in the case show that the alleged acts of bankruptcy were committed.

HOFFMAN, J.—It is not denied by the counsel for the petitioning creditors that attaching creditors have the right to intervene and contest the adjudication where fraud or collusion between the petitioning creditors and the debtor is alleged, or where the former are alleged not to constitute the requisite quorum of creditors, or where the jurisdiction of the court is denied.

(*In re* Boston, Hartford & Erie Co., 6 N. B. R., 210; *In re* Bergeron, 12 N. B. R., 385; *In re* Mendelsohn, Id., 533; *In re* Hatje, Id., 548; *In re* Jack, 13 N. B. R., 296; *In re* Derby,

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8 N. B. R., 106; *Clinton v. Mayo*, 12 N. B. R., 39; *In re Williams*, 14 N. B. R., 132; *In re Fogarty*, 4 N. B. R., 451; *In re Scrafford*, 14 N. B. R., 184.)

It is contended, however, that this right to intervene does not extend to cases where default has been "made to appear pursuant to the order," and where the intervening creditor merely desires to contest the commission by the debtor of the act of bankruptcy alleged.

In support of this position the provisions of the forty-third section of the Act are chiefly relied on. That section provides "that if the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt," etc.

It is insisted that by these provisions "the default of the debtor to appear, pursuant to the order," is made equivalent to a voluntary petition filed by him, and that the adjudication follows as the necessary consequence. No authority is cited in support of this construction of the Act.

In some of the cases above referred to the debtor appears to have made default, but that circumstance is not alluded to by either court or counsel. (*In re Jack*; *In re Hatje, ubi sup.*)

The right to intervene is placed either on the express provisions of the amendment to section 39 or upon the more general considerations stated by Mr. J. Woodruff in the case of the Boston, Hartford & Erie RR. Co. (6 N. B. R., 210.) These are that a petition in involuntary bankruptcy is not a mere suit *inter partes*, "but rather partakes of the nature of a suit *in rem*, in which any actual creditor has a direct interest, and that a party claiming to be a creditor, and who is able to satisfy the court that he is a creditor, and that his purpose is a meritorious, and not a purely officious one, ought to be allowed to intervene and object to the proceeding."

In the case of *Williams*, it was claimed, as in this case, that though the attaching creditor may intervene to contest the jurisdiction of the court, he cannot put in issue the act of bank-

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ruptcy. But Mr. J. Brown observes: "On the contrary, however, in the case of *Brewster v. Shelton* (24 Conn., 140), the attaching creditor was permitted to come in and claim that the proceedings were collusive as to him, precisely what is claimed in this case and Mendelsohn. (12 N. B. R., 533.) In the case of Jack (13 N. B. R., 296), the attaching creditor was permitted to test the question of merits. No distinction in principle is perceived. The creditor has an interest to protect.

"By the adjudication his attachment is *ipso facto* dissolved, and he has a right to inquire whether an act of bankruptcy has, in fact, been committed, as well as whether the court has jurisdiction to entertain the petition.

"Underlying all the discussion on this subject is the general principle of law that no man shall be deprived of his property without the opportunity of being heard. An assumption of this kind is at war with our whole system of jurisprudence." (14 N. B. R., 135.)

It will be observed that though the learned judge alludes to alleged collusion in the proceeding, he places the right to intervene on the broad ground that any creditor who will be directly affected by the proceeding has a right to be heard. Indeed, in almost every case where the debtor admits the commission of an act of bankruptcy, which in fact he has not committed, in order to defeat an attachment, he may be said to be acting in collusion with the petitioning creditor, and such is said to be the fact in the case at bar.

In the case of Jack, above cited, the collusion was of the same nature. The debtor omitted to resist the adjudication on the merits, and intervening judgment creditors were allowed to do so.

In the case of the Boston H. & E. R.R. Co., above cited, although fraud and collusion were alleged, the decision turned on the fact that proceedings were pending in another district against the debtor, and this a creditor, who had not proved his debt, was allowed to show in abatement of the second proceedings. Nor was the decision placed on the ground that the court had no jurisdiction over the second proceeding, for the direc-

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tion given to the Connecticut court was to stay the proceedings until the court in Massachusetts "had made some adjudication on the petition pending before it, nor should the proceeding be even then necessarily dismissed. It might be advisable to continue it, to fall back upon if the Massachusetts decree should, for any reason not applicable to the Connecticut proceedings, prove unavailing or erroneous."

In this case, also, the debtor appears to have made default.

The foregoing authorities show that the right to intervene is not confined to the cases to which the counsel for the petitioning creditors restricts it—on the contrary, it is placed on the broad ground of the right of a party to be heard in a proceeding by which his interests will be directly affected; and, further, it appears that the collusion alleged in several of the cases was precisely of the kind claimed to exist in the case at bar, viz., the tacit confession by the debtor of an act of bankruptcy, which, in fact, he had not committed. But, independently of the authorities, I should be of the opinion that the terms of the forty-second section do not require the literal construction contended for. Its language is: "If the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt," etc.

The Legislature is here prescribing in general terms the proceedings to be had on the return day of the rule to show cause. Of course, if no one appears to contest them, the allegations of the petition are taken *pro confesso*. But it was not the design of the section to prescribe who should be allowed to appear and oppose the adjudication. By the very letter of the section the bare appearance of the debtor might take the case out of its operation; but it is obvious that he must not only appear, but must deny the allegations of the petition, or must otherwise show cause why he should not be adjudged.

The phrase, "If the facts set forth in the petition shall be found to be true," evidently contemplates an investigation, and by the elementary principles of law and justice all persons to

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be directly affected by its result have the right to be heard. I cannot think that the succeeding clause, which contemplates the default of the debtor, should be construed to take away that right.

It is urged that as by a voluntary petition the debtor could procure an adjudication, notwithstanding the opposition of his creditors, it is no greater hardship upon them to treat his default as equivalent to the filing of a voluntary petition by him.

There might be force in the argument if the proceedings were or could be made the equivalents of each other. But they are not so. In voluntary cases, the debtor, to obtain his discharge, must procure the assent of a certain proportion of his creditors in number and value, or his assets must amount to a certain percentage of his debts.

In involuntary cases he is entitled to his discharge, irrespective of either of these requirements.

In voluntary cases preferences are avoided, if made within four months. In involuntary cases they are valid, unless made within two months.

The reasons for this discrimination it is not easy to conjecture. By an apparent oversight the period within which attachments are avoided has been allowed in both classes of cases to remain as originally fixed, viz., four months.

It may thus happen in an involuntary case that creditors who have openly, and in the fair prosecution of their legal rights, obtained liens by attachment within four months of the bankruptcy, will be deprived of them by the adjudication and assignment, while other creditors, who have obtained secret preferences more than two months prior to the proceedings, will be protected.

The attaching or other creditors may thus have the strongest interest to compel the proceedings to assume the voluntary form, where all will be placed on the same footing, and where the preferred creditor will have no greater protection than the attaching creditor.

In the case at bar the denial to the intervening creditor of the right to contest the commission of the alleged act of bank-

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ruptcy would be a peculiar hardship. That act is the procuring by the bankrupt of his property to be taken on legal process by the intervening creditor. The latter is therefore in effect charged with fraudulent collusion and combination with the bankrupt to obtain a preference. If his right to intervene be disallowed, he will practically be convicted of this charge by the mere omission of the bankrupt to appear, and with no opportunity afforded him to deny or disprove it.

On full consideration of the whole matter, I feel compelled to hold that any creditor whose interests are directly affected by the proceedings, has a right to intervene and contest the allegations of the petition with regard to the acts of bankruptcy alleged, notwithstanding that the debtor has failed to appear on the return-day, pursuant to the order.

With regard to one of the acts of bankruptcy alleged, no adequate proof is produced. It is claimed that the denial of its commission by the intervention is insufficient. But the general denial is in the form prescribed by the Supreme Court for the debtor himself, and no reason is perceived why the same form should not be used by the intervening creditor seeking to raise the same issues.

The special denial is a little inexact in language, and possibly an exception to it in the nature of a special demurrer might have been sustained. But the objection comes too late after the issue is accepted and a trial had on the merits.

Mr. J. Woodruff observes, with respect to a similar intervention: "The proceeding is summary and in a high degree informal, and it should be free from technical embarrassment." I am inclined to think that the objection could at no stage of the cause have been available. The other act of bankruptcy, and which is chiefly relied on, is alleged to have been the procuring by the debtor of his property to be taken on legal process. I do not think it necessary to recapitulate the proofs. I agree with the register in the opinion that the evidence does not disclose any collusion or complicity between the debtor and the attaching creditors, or any knowledge or expectation on the part of the former that the attachment was to be levied. He

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can in no sense be said to have procured it. The petitioning creditors have therefore failed to establish the act of bankruptcy alleged in the petition.

Had it appeared that the debtor advised or even suggested the levy, the case might have been different. "Very slight evidence of an affirmative character of the existence of a desire to prefer one creditor will be sufficient to invalidate the transaction." (*Wilson v. City Bank*, 9 N. B. R., 97; 17 Wall, 473.)

It may seem strange that the mere existence of a desire to prefer, evidenced by a mere suggestion to the creditor to sue or attach, should have such a controlling effect upon the consequences of the proceeding. But such appears to be the law, and it makes no difference whether the question arises in a proceeding, like that in the case last cited, to set aside a levy on execution alleged to have been "procured or suffered" by the debtor, or, as in the case at bar, an inquiry whether the debtor has "procured his property to be taken on legal process," and thereby committed an act of bankruptcy.

The practical effect of the decision which I feel compelled to make is to give to the attaching creditors the whole or the greater part of the assets of the debtor, to the exclusion of the other creditors.

The chief object of the Act is thus defeated by the inability of the creditors to prove the act of bankruptcy necessary to bring the debtor within its operation.

It may be suggested that this anomalous result would have been avoided if the mere fact that the debtor's property has been taken on attachment or execution for a valid debt, and has remained under seizure a prescribed period, had been declared, by the law, an "act of bankruptcy," irrespective of any "*desire*" or procurement on the part of the debtor.

It is not impossible that such may have been the intention of the framers of the original Act when the words "procure or suffer his property to be taken" were adopted; not that, as has been argued, he must be deemed to have "suffered" the seizure because he did not prevent it by going into voluntary bank-

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ruptcy, but that he has "suffered" it because, by not paying his debt, he has put it into the power of his creditor to attach his property. By the existing provisions of the Act, the arrest and imprisonment of a debtor for a provable debt for more than twenty days is declared to be an act of bankruptcy. No reason is perceived why the seizure and detention of his property for a like period might not be similarly regarded.

I also venture to suggest for consideration the inquiry whether there is any good reason for discriminating between liens acquired by attachment and those obtained by judgment and levy on execution.

If the creditor is obliged to surrender his lawfully acquired lien in the one case, why not in the other?

There seems to be no reason why a lien by attachment for a just debt should be any less respected than a lien by levy after judgment, for the same debt, and as the law now stands opportunities for fraud are afforded.

If the creditors attach and the debtor is desirous of suffering one of them to obtain a preference, he has only to delay the other's proceedings by dilatory pleas, or otherwise, until the favored creditor has obtained a judgment and levy on execution, unopposed. He may then go into bankruptcy. The lien of the attaching creditor who has obtained no judgment will be dissolved, while that of the judgment creditor will be respected—unless collusion can be shown—which is always difficult of proof, and which, in fact, may not have existed.

If judgment and attachment liens were put on the same footing, the perplexing, uncertain, and often subtle inquiries into the debtor's motives and "desires," whether there has been "collusion" between the parties, and whether the judgment has been obtained by the debtor's instigation or procurement, would be avoided, the rights of the assignee and the creditor would be clearly fixed by law, and the expense of much uncertain and often fruitless litigation would be saved.

In re Sawyer.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

MARCH, 1877.

It is the duty of registers to examine and regulate the charges, whether any creditor objects or not.

Where there are debts due workmen which are privileged, the assignee has no right to waste their money in litigation for the supposed benefit of the general creditors.

If the general creditors agree, the assignee should pay the privileged debts as soon as he realizes enough money for that purpose.

In re J. M. SAWYER.

LOWELL, J.—The account rendered in this case brings to view one of the weak points of this, as of all other bankrupt laws—the temptation which assignees are under to exhaust the assets in unwarrantable charges. I wish it to be distinctly understood that it is the duty of the register to examine and regulate the charges, whether any creditor takes the trouble to object to the account or not. I had supposed this to be well known, but this account seems to have lain in the register's office for some months without action.

The assignees in this case have received about six thousand dollars, and the charges for legal services are about two thousand dollars, and for the assignees themselves twelve hundred dollars. These are all disallowed. For their services the assignees may have the commissions established by the rule of the Supreme Court, and no assignees are ever to have more without my order, as I have already decided. For counsel fees I allow the sum of two hundred dollars. I disallow the item of one hundred dollars paid to the register's clerk. The bill will be reformed by the clerk on this basis, and a dividend will be paid forthwith to the privileged creditors of the amount in the hands of the assignees, as found upon a proper accounting.

In this case, the debts, not exceeding fifty dollars each due the workmen, are more than enough to absorb the funds, and I wish to repeat what I said at the hearing, that where there are debts due workmen which are privileged, the assignee

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has no moral right to waste their money in litigation for the supposed benefit of the general creditors. If the latter want litigation they must pay for it. In future I shall allow no counsel fees in such a case until the privileged debts are paid in full. I do not think it necessary, in most cases, that the workmen should be put to the expense of proving their debts, and the estate to the very considerable cost of paying their dividends in due and regular form. If the general creditors agree, the assignee may pay them, out of hand, as soon as he receives enough money for that purpose, or may pay a part equally among them. The assignee, no doubt, is entitled to the protection of a proof, if he requires it; but he will not often find it essential to his safety.

UNITED STATES DISTRICT COURT—W. D. WISCONSIN.

NOVEMBER 21, 1877.

Petition in bankruptcy held defective in not setting out the special authority of the president of a bank, who is one of the petitioning creditors, to sign and verify the same on behalf of the bank, his general authority as an officer not being sufficient.

The petition alleges that the creditors joining in the petition constitute one-fourth in number of all the creditors whose provable debts amount to two hundred and fifty dollars. In setting out the names and amounts of each, however, it appears that the debts of several of them are less than that sum. *Held*, on a motion to dismiss the petition, that the same is insufficient and demurrable in this respect, but that the court has jurisdiction to allow an amendment to remedy the defect.

In re Petition of PATRICK J. ROCHE and others v. MICHAEL A. FOX.

BUNN, J.—This cause came on to be heard before the court upon the application of the petitioners, by *H. M. & H. A. Lewis*, their counsel, and upon the motion of Philo A. Orton and George S. Anthony, two of the creditors, by *Gregory & Pinney*, their counsel, to dismiss the petition for want of jurisdiction in the respects following:

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1st. That it appears upon the face of the petition that the same is not signed and verified by a sufficient proportion in number of the creditors.

2d. That it does not appear from the petition that the officer signing for the National Bank of Galena had authority to act for the bank in the matter.

3d. That the authority of L. D. Lange, who signs the names of Morrison, Plummer & Co., does not appear in the petition.

4th. That Francis B. Newhall, one of the petitioning creditors, does not sign the petition.

5th. That the several debts of eight of the petitioning creditors are for less than two hundred and fifty dollars.

6th. That the petitioning creditors have filed no proof of their several debts.

Some, if not all of these objections to the petition, are well taken; but I am not able to concur with the defendant's counsel that the court has no jurisdiction of the case which would enable it to allow amendments to cure the defects complained of.

It is quite clear that the authority of R. H. McClellan, President of the National Bank of Galena, to act for the bank in the matter, should be set forth in the petition, as the president, by virtue of his office as such, has not the power. (*In re McNaughton*, 8 N. B. R., 44.) But it does not follow that the petition should be dismissed for this reason. I think the court may and should order an amendment to remedy the defect. This will not be adding a new cause of action, but perfecting a defective allegation in a cause already set forth.

The same with the case of L. D. Lange, who signs as the agent for Morrison, Plummer & Co. The petition should aver specially his authority to act in the matter for them. But the defect is not jurisdictional and is not a cause for dismissing the petition. It may be amended.

So I think with the other objections. The objection mainly relied upon, and the one having the greatest show of authority, if not of reason to support it, is, that several of the creditors

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signing the petition, as appears from the schedule of claims set out in the body of the petition, have claims amounting to less than two hundred and fifty dollars each. The allegations in the petition are entirely sufficient on this point, and show that the creditors signing the petition constitute one-fourth at least in number of all the creditors whose claims exceed two hundred and fifty dollars, and the aggregate of the debts due the petitioners to at least one-third of all the debts provable. But when the names of creditors, and the amount of the claim of each, are set out, it appears that eight of fourteen creditors have each claims amounting to less than two hundred and fifty dollars. These cannot be reckoned in making up the one-fourth in number required by the statute. Nor do I think the court can presume that the remaining six creditors, whose claims exceed two hundred and fifty dollars, constitute the requisite one-fourth of all. Such is not the allegation in the petition, and the necessary inference is that the eight creditors whose debts do not exceed two hundred and fifty dollars must be counted to make up the one-fourth. (*In re McKibben*, 12 N. B. R., 97; *In re Hadley*, Id., 366.) But the petitioners ask leave to amend the petition in this respect so as to avoid this objection, and the question is whether the amendment may be allowed. I think the court has power to allow the amendment, and that in furtherance of justice the power should be exercised for its allowance. It is claimed that the court has not jurisdiction. Jurisdiction of what? The law gives the court jurisdiction of the subject matter before any petition is filed. And the filing of the petition, the service of process, and the appearance of the alleged bankrupt in the cause, are ample to give jurisdiction of the person. What question of jurisdiction remains? In a certain sense it is true the court has not jurisdiction. It cannot proceed to furnish the relief prayed for upon a petition which is demurrable in not containing all the necessary allegations. And the true force of the objections, to my mind, does not go to the jurisdiction of the court, but only to the sufficiency of the petition as a pleading. The petition in bankruptcy answers to the declaration or com-

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plaint in an action at common law, or bill of complaint in equity. Its office is to set forth the cause of action.

It was never yet held that a complaint in an action at law or suit in equity should be dismissed for a want of jurisdiction in the court, when suit has been commenced by service of process, and an attempt made to set out a cause of action, but the complaint is defective in some particulars in not containing all the essential allegations to make a good case. Such defect would be good ground for demurrer, which, if sustained, leave would be given to amend, which, of course, could not be done if the court had not jurisdiction. It must in such case dismiss the proceeding.

There is but one case that I have found where it is held that such a defect was so far jurisdictional as to deprive the court of all power of amendment. That is *In re Rosenfields* (11 N. B. R., 86). But that case is expressly overruled in a later case in the same court (*In re McKibben*, 12 N. B. R., 97), and was disapproved, and the contrary ruling made in the well considered case of *Ex parte Jewett*, *In re Morris*, by Lowell, J., in the District Court for Massachusetts. (11 N. B. R., 443.)

If any further authority was needed, we have it in the case of *Williams v. McPheeters*, 11 N. B. R., 145), decided by Judge Drummond, where such an amendment is expressly sanctioned and held to relate back to the commencement of the proceeding in bankruptcy.

These cases are decisive of the question here presented.

The motion to dismiss is overruled, and upon request of counsel for petitioners they are allowed ten days in which to file an amended petition curing the several defects complained of.

UNITED STATES DISTRICT COURT—W. D. WISCONSIN.

NOVEMBER 23, 1877.

Where there has been an adjudication in bankruptcy against a mercantile partnership, and the assets of the firm turned over to the assignee, the

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individual partners are not entitled to claim as exempt, under Sub. 9, Sec. 30, Ch. 34, R. S. of Wis., each the sum of two hundred dollars out of the partnership stock.

In re ROBERT HUGHES and THOMAS TEAGUE.

Lanyon & Spensley, for assignee.

BUNN, J.—This case is certified to this court by the Register in Bankruptcy for its decision upon the following question :

Hughes & Teague were partners doing a general merchandise business at Mineral Point, Wisconsin. In September, 1877, as such partners, and without having severed their interest in the partnership goods, they filed a joint petition in bankruptcy, and were thereupon adjudged bankrupts, and their entire stock and effects assigned to the assignee. Afterwards the several partners filed a claim to be allowed each the sum of two hundred dollars as exempt out of the general stock of partnership goods in the hands of the assignee, naming the articles at length which each claimed, and demanded that the assignee deliver and surrender to each the articles so severally claimed by them as exempt under Section 14 of the Bankrupt Act.

The question is, Are the goods so claimed exempt under the law? The language of Sub. 9, Sec. 30, Chap. 34, R. S. of Wis., is: "The *tools and implements*, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value." It has generally been held in this State that an individual merchant may, under this provision, hold two hundred dollars of his stock as exempt, though the Supreme Courts of Minnesota and Kansas, under statutes similar but not identical in terms, have held that the provision did not extend to this class of traders; and a strong argument might be made, upon the language of the statute, that it was intended to apply only to mechanics, miners, or other persons similarly situated and requiring tools and implements, and *perhaps* stock in trade, to carry on their business, such as

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well-diggers and the like. Otherwise, according to a familiar rule of construction, why should not the merchant have been mentioned, which is quite as prominent a class, as well as the mechanic and miner, and not left to be included by inference under the term "other persons"?

But, conceding that a more liberal interpretation would allow an individual merchant the exemption, does the right extend to each and all the members of a partnership firm so that the exemption may be doubled and quadrupled and indefinitely multiplied, according to the number of the partners, and without any reference to the amount of actual or equitable interest they may severally have in the partnership assets, how much capital each has contributed to the firm, or the condition of the accounts as between themselves, or as between them and the creditors, at the expense and perhaps ruination of the joint creditors' claims? If this were any way an open question, I should have no hesitation in saying that such a claim could not be sustained. That the exemption is a personal privilege given to a debtor who owns the goods, and was never intended to apply to mercantile partnerships or corporations. One partner cannot be said to be the owner of the goods held by the firm; he has no exclusive interest in them. It is entirely uncertain whether any of them will belong to him until the affairs of the partnership are wound up. But I think the question must be considered as settled, and rightly so upon reason and authority, by the cases following: *In re Blodget* (10 N. B. R., 145); *Pond v. Kimball* (101 Mass., 105); *Guptil v. McFee* (9 Kan., 30); *In re Price* (6 N. B. R., 400); *In re Boothroyd & Gibbs* (14 N. B. R., 223); *In re Handlin & Venny* (12 N. B. R., 49); *In re Stewart & Newton* (13 N. B. R., 295).

But it is claimed by the bankrupts in this case that the rule is otherwise settled in this State by the case of *Russell v. Lennon* (39 Wis., 570). But I do not so understand that case. I do not see that that case is at all in conflict with the general current of authority as stated in the above cited cases. In that case the plaintiffs were partners doing a business as tanners

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and jobbers. The defendant as sheriff levied on the partnership property in their store to satisfy a judgment against the firm. Thereupon the partners made a claim for an exemption of two hundred dollars each from the partnership goods, and brought a joint action to recover the goods so claimed from the sheriff. The Circuit Court gave judgment for the plaintiffs, sustaining the claim thus made. The question was whether the judgment was right. The Supreme Court held that the action could not be maintained, and reversed the judgment. And this is all that the case decides. It is true the courts say, in their opinion, that there appeared to be no doubt that if the respondents had held the property in equal moieties in severalty, they would have been entitled to hold each his share as his exemption under the statute. And in another part of the opinion they say, "We have no doubt that, in proper cases, each member of a partnership is entitled to his separate exemption out of the partnership property; and that the partnership property, after levy, may be severed by the partners, so that each partner may have his several exemption." The court had no occasion to define, and did not undertake to define, just what those proper cases were in which each member of the firm would be entitled to his separate exemption out of the partnership property; but it is evident that when they arise they must be cases where "the partnership property *after levy may be severed by the partners.*" It is enough to say that this is not one of the cases referred to in that opinion. The partners in this case do not "hold the partnership property in equal moieties in severalty." It is not a case in which the partners after levy may sever their interests in the property. There is no levy, and the partners have no interest in the property capable of severance. They have, in fact, no interest at all, except the contingent and uncertain one of a right to any surplus that may remain after paying all expenses and disbursements in the bankruptcy proceedings, and the claims of partnership creditors.

It is conceded that there was no severance of the partners' joint interest in the partnership property in this case previous

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to the adjudication in bankruptcy. But that event dissolved the partnership and transferred the title to all the partnership property, except such as was exempt at the time of the adjudication, to the assignee. So that, if there was no severance at the time of the adjudication, so as to entitle the several partners to the exemptions, there could be none afterwards.

All that case decides is that co-partners cannot, under the exemption law in question, and claiming for each an exemption of two hundred dollars, maintain a joint action to recover partnership goods taken under an execution issued against the partnership. The court holds that the principle of exemption, as well as the provisions of the statute, are personal, and they cite with approval the case of *Pond v. Kimball, supra*.

The decision of the court is that the claims of the bankrupts to an exemption of two hundred dollars each out of the partnership property, under the exemption laws of this State and the Bankrupt Law, cannot be allowed.

SUPREME COURT—NEW HAMPSHIRE

An adjudication of a bankrupt, who was under arrest in a civil action at the time the proceedings were commenced, does not entitle him to a release from such arrest.

BRANDON NATIONAL BANK v. HATCH.

THE writ was served by arresting the body of the defendant, the affidavit required by law having been made thereon. It was admitted that within sixty days after the service of the writ, as aforesaid, the defendant was adjudged a bankrupt. Upon the entry of the action at this term, the defendant moved that he be discharged from said arrest and that his bail be discharged. It did not appear that the plaintiffs had proved their claim in bankruptcy. The Court *pro forma* granted the motion, and the plaintiffs excepted.

Brandon National Bank v. Hatch.

F. A. Faulkner, for the plaintiffs.

Pike & Spring, for the defendant.

SMITH, J.—Section 5107 of the Revised Statutes of the United States provides that “No bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.”

This section is almost a literal re-enactment of Section 26 of the Bankrupt Act of 1867. This provision applies only to arrests made subsequent to the date of proceedings in bankruptcy.

When the debtor is arrested prior to the commencement of such proceedings, there is no provision of the Bankrupt Act that provides for his release. (Bump on Bankruptcy, 151 (5th ed.); *In re Walker*, 1 N. B. R., 318, 1 Low., 222; *In re Hazelton*, 2 N. B. R., 31, 1 Low., 270; *Minon v. Van Nostrand*, 4 N. B. R., 108, 1 Low., 458.)

In re Walker, Lowell, J., remarks: “If it had been the intent of Congress to release debtors in custody, it is probable that provision would have been made concerning the effect of such release upon the debt. And it is not at all improbable that some difficulty may have been felt in dealing with this point, for the reason that the effect of an arrest is a matter of local law, and Congress might doubt its competency to relieve from the arrest and yet preserve the debt, if the local law held it to be discharged thereby.”

In *Minon v. Van Nostrand*, it was held that a debtor, under arrest at the time his petition in bankruptcy is filed, cannot be released on *habeas corpus*. This conclusion is the necessary construction of the statute and of the rule of the Supreme Court founded upon it, that the benefit of the writ was only for bankrupts after they became such. The same learned judge remarked: “It may be that Congress hesitated to interfere with a consummated arrest, under the apprehension that the debt might thereby be discharged, and not be revived if the bank-

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rupt should fail to obtain his discharge in bankruptcy; or it may be that the case was overlooked. However I may regret the fact, a bankrupt seems to be left, under such circumstances, to the operation of the laws of the State."

It does not appear whether this action is founded on a debt or claim from which a discharge in bankruptcy, if the defendant should obtain one, would release him. If it is not, then the defendant is not entitled to be discharged from arrest upon the ground that he has been adjudged a bankrupt.

But, on the other hand, if it is, it is clear, upon the strength of the foregoing authorities, that the debtor is not entitled to be discharged from arrest until the question of his discharge in bankruptcy shall have been affirmatively settled. Congress has only provided for the exemption of the debtor from arrest during the pendency of proceedings in bankruptcy against him. Its omission to provide affirmatively for his discharge from arrest, made before such proceedings were commenced, affords very strong ground for inferring that it was not the intention of Congress to provide for such a contingency.

If the defendant shall obtain a discharge in bankruptcy, and this debt or claim is one from which such discharge will release, the debt or claim will thereby become in effect extinguished, and with it will fall all proceedings to enforce it. The defendant will then be entitled to be discharged from arrest by the State court, and also by the district court, upon proceedings for that purpose. (*In re Borst*, 2 N. B. R., 171.)

CUSHING, C. J., and STANLEY, J., C.C., concurred. Exceptions sustained.

UNITED STATES DISTRICT COURT—MAINE.

DECEMBER, 1877.

Where a suit against the bankrupt to enforce a lien is pending at the time of adjudication, the lien creditor may, before any final disposition of such suit, prove his demand in the Bankrupt Court, and have it allowed as a lien claim, with all the rights and privileges belonging to it under the bankrupt law.

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Where property has, by order of the Bankrupt Court, been sold subject to a lien, the assignee's deed providing that such lien is to remain in full force, the purchaser is estopped to deny the validity of such lien.

Where the Bankrupt Court has adjudged a claim to be a lien upon property of the bankrupt, it has jurisdiction of an action to enforce such lien against third parties who have purchased said property subject to the lien at a sale by the assignee.

*JOSIAH A. BUCKNAM v. DAVID DUNN and
OLIVE R. GOSS.*

Fox, J.—On the 14th day of May, 1874, a petition was filed in bankruptcy against Daniel M. Goss, and he was subsequently adjudged a bankrupt by this court, and the complainant duly appointed assignee of his estate. Goss was the owner of the right, in equity, of redemption of a certain lot of land in Minot in this district, and said Bucknam, at various times between the 4th of November, 1873, and the 31st day of January, 1874, furnished materials and labor, at the request of said Goss, for the erection of a store upon said lot, to the amount of five hundred and eighty-four dollars and eighty-one cents, including interest and costs of suit, for which, under the law of this State, he had a lien upon the right of redemption of said lot by said Goss. A suit to enforce such lien must be commenced within ninety days after the last labor is performed, or materials furnished, or the lien therefor is dissolved.

On the 20th day of April, 1874, and within the ninety days, Bucknam sued out his writ of attachment against said Goss to secure his lien, and attached thereon all of said Goss's interest in the lot and the buildings thereon; this action was returnable to and entered at the September term of the Supreme Judicial Court for the County of Androscoggin, and thence continued to the January Term, when the plaintiff discontinued his action. If the same had proceeded to judgment, and the plaintiff had prevailed, the judgment therein would have been against said Goss personally, which could have been satisfied either by enforcing the lien upon the lot and building, or by levy on any other property of said D. M. Goss.

Prior to the discontinuance of his lien suit, viz., January 1, 1875, said J. A. Bucknam proved his claim in bankruptcy

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against said Goss's estate, setting forth in his proof the nature of his claim, and the commencement and pending of his action therefor, and claiming to prove the same as a valid and existing lien for the claim and costs, as allowed by the statute of this State, and the same was allowed by the court in bankruptcy as a valid lien for the full amount.

On the 26th of January, Bucknam, as assignee, petitioned the court for leave to sell all the interest which he had as assignee in the lot and store, reciting in his petition the various incumbrances, and among others "a lien claim of five hundred and eighty-four dollars and one cent, in favor of Josiah A. Bucknam, which lien claim was duly proved January 1, 1875," and prays for leave to sell, subject to these incumbrances. A sale was so ordered by the court. The license enumerating the existing incumbrances, and among others Bucknam's lien for five hundred and eighty-four dollars and one cent, and authorizing a sale subject to such incumbrances, the sale was so made, and at the time and place appointed David Dunn became the purchaser for the sum of eighty dollars, his deed from the assignee conveying to him "all the right, title, and interest which I, said Josiah A. Bucknam, have and hold in my said capacity of assignee in and to the following described premises. The same being subject to a mortgage. The same being subject to a lien claim in favor of said Josiah A. Bucknam of five hundred and eighty-four dollars and one cent, with interest and taxes; and I, the said Josiah A. Bucknam, do not sell or convey, nor waive my said lien claim, but my said lien claim is to remain in full force in me and my heirs and assigns forever; and said lien claim is saved, reserved, and excepted to me and my heirs and assigns forever, and said parcel of land is conveyed subject to my lien claim." The deed to Dunn has never been recorded, but on the 18th day of August, 1876, said Dunn released to Olive R. Goss, the wife of the bankrupt, all his right, title, and interest in the premises.

The lien of Bucknam on the premises never having been in any way adjusted, he now brings this bill in equity against Dunn and Mrs. Goss for relief. The defendants contend that

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if the claim was originally a valid lien claim on these premises, the only course which the plaintiff could adopt was to prosecute his action, commenced within the ninety days, to final judgment and execution, and levying on the premises; that by discontinuing the action the lien was lost and could not be saved or protected by the proof of the debt, as a lien claim, prior to such discontinuance. It is very certain that if Goss had been adjudged bankrupt within the ninety days, the proper course for a lien claimant to adopt to secure his rights would have been to prove his debt as a valid lien upon the estate of the bankrupt; in fact, no other course could have been adopted without the sanction of the court in bankruptcy, as it is discretionary in the Bankrupt Court to permit lien suits to be commenced in the State courts after bankruptcy proceedings are instituted. Such suits are attended with delay and expense, and as the Bankrupt Court is by the act fully empowered to ascertain and liquidate all liens, it may well discharge this duty and not permit suits to be instituted to waste the property in its hands. When a lien claim is thus proved, during the time in which, by the State law, an action may be instituted, the creditor has done all that is required for the security and protection of his claim. If allowed by the court as a lien claim upon such proof, nothing further remains than for the court in bankruptcy, at the proper time, to liquidate the claim either from the general assets or from the property which has come into the hands of the court, charged with this incumbrance. The lien creditor, however, must take care, if the debtor is not adjudged a bankrupt within the ninety days, to secure his lien within that time by suit and attachment of the property, and by so doing his lien is saved and not dissolved. Such a suit is, in fact, an extension and continuance of said lien beyond the ninety days, and is thus continued in full force until the suit is finally disposed of; and, in the opinion of the court, if after the ninety days and before any final disposal of such suit, such lien creditor elects to prove his demand as a preferred claim, as an existing lien, he may so proceed with the sanction and approval of the court in bankruptcy, and with the same effect as though the

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proof had thus been made within the ninety days. On the first of January, 1875, Bucknam's claim was a valid lien claim against the lot and building, by reason of his suit, which had been instituted within the ninety days, being then pending; he could, by leave of the Court in Bankruptcy, have proceeded with his suit and so saved his lien; or he could, in order to save delay and expense, place before the court his demand, with the evidence of its then being an existing valid lien, and pray the court to recognize and protect it as such. If it is admitted that on January 1st Bucknam had a valid lien for his claim which he could make available by the prosecution of his suit, it seems to the court to follow as a matter of course that, as it is made by the Bankrupt Act the duty of the court to ascertain and liquidate all liens, the court was bound to receive the proof of this being then an existing lien, to determine whether such was or not the fact, and when it had so ascertained to allow the claim, as a lien claim, with all the rights and privileges belonging to it under the Bankrupt Law.

It is of no consequence what is the motive, character, or origin of the lien, or what are the remedies to be pursued under the provisions of the State law for its enforcement; the only question is, whether at the time the proof is offered there is then a lien which has attached to the claim for its security. This being the case, and so determined by the Bankrupt Court, it must follow that it is the duty of the court to protect it and allow the claimant the full benefit of his lien upon the property.

In the present case these respondents are not in a position to question the validity of this lien. The court, whether rightfully or not, has allowed this claim of the complainant as a valid lien upon the premises in question, and has ordered the sale to be made, subject to this lien and claim as a valid incumbrance on the premises, and it was so purchased by Dunn, he well knowing of this order of the court, and he has accepted a deed from the assignee which fully sets forth this among other incumbrances on the premises, and that the sale is made subject thereto, and the lien claim "is saved, reserved, and excepted to said Bucknam and is to remain in full force." Claiming under

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such a conveyance, Dunn is estopped to deny the validity of this lien upon the property thereby conveyed, and as Mrs. Goss's title is but a mere quit-claim and release from Dunn of his right, title and interest, she has acquired no greater right than Dunn was entitled to by his conveyance.

The defendants further contend that if the plaintiff's claim still remains a valid existing lien on the premises to them conveyed, that the District Court has no jurisdiction thereof in the present action. They claim that the assignee having disposed of and conveyed all the rights in the premises vested in him as assignee, subject to this incumbrance, the District Court has parted with all interest therein, and that the plaintiff must seek his redress in the State courts. The jurisdiction of this court extends "to all acts, matters, and things to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt, and the close of proceedings in bankruptcy." I admit the jurisdiction of the State courts in this behalf, but I am of the opinion that the District Court, in this proceeding, may still afford the plaintiff the proper relief. The Bankrupt Act having conferred upon the District Court authority to ascertain and *liquidate* all liens, when a lien is ascertained by the court it fails to accomplish its duty unless it completes the work devolved upon it, by liquidating the same, and the power to liquidate liens includes the power of paying the same; and as an incident to such payment, a power of sale of the property charged therewith, in order that the amount of the lien may be paid thereby. Complete jurisdiction is given by the act to this court to accomplish of itself all the purposes of the law and to enable, it independently of any other jurisdiction, to begin, continue, and end all such proceedings as may be necessary and proper to accomplish the entire settlement of the bankrupt's estate. (Bump, 10 Ed., 326, and cases there cited.)

The plaintiff having appealed to this court for the protection of his rights, for the recognition and enforcement of his lien as security for his demand, and the court having allowed his claim as a valid lien upon the premises, having precedence

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of any interests acquired by the respondents, and they having refused to satisfy and discharge the same, it is incumbent on the court to complete and consummate the lien, and render the same available and beneficial to the plaintiff; and the jurisdiction of the court having once attached, continues until the desired object is accomplished, until the lien is liquidated and satisfied out of the premises thereby encumbered. It may be that the estate which is subject to the lien will not, upon sale, provide sufficient, after payment of prior incumbrances, to fully satisfy the plaintiff's claim, and any deficiency remaining unpaid will stand as a debt due from the bankrupt, entitled to receive its dividends with other creditors, payable from the general assets of the estate; the court, therefore, before it can finally close the estate, must ascertain whether the property encumbered by this lien will produce sufficient to pay the full amount of the lien, leaving the general estate for distribution among the other creditors, and the jurisdiction of the District Court over the entire estate remains until the final settlement is completed.

Decree for complainant.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

DECEMBER, 1877.

Where a firm, which has indorsed a note of one of the partners, becomes bankrupt before the maturity of such note, protest and notice to the firm of its dishonor is not necessary in order to prove it against the joint assets.

Ex parte A. W. RUSSELL. In re J. F. PAUL & SON.

LOWELL, J.—This case has been submitted to me on a short statement of facts without argument. The note which Mr. Russell offers to prove against the assets of the firm was made by Joseph F. Paul, and indorsed by Joseph F. Paul & Son. The partners were made joint bankrupts before the maturity of

Ex parte Russell. In re Paul & Son.

the note, and it was not protested, and no notice was given to the firm of its dishonor.

It is settled that where one partner accepts a bill drawn by his firm, or makes a note which his firm indorse, demand on him and notice of his default are unnecessary, because the knowledge of one is the knowledge of all. (*Porthouse v. Parker*, 1 Camp., 82; *Rhett v. Poe*, 2 How., 457.) It has been held that if one partner makes the note, and the other indorses it, though for a firm debt, there must be demand and notice, because they are binding themselves separately. (*Foland v. Boyd*, 11 Harris, 476.) Here, however, that point does not arise.

When the parties, or any of them, to the note or bill are bankrupt, notice is not dispensed with. In the leading case on this subject, *Bayley, J.*, expressed himself somewhat cautiously: "It is not necessary to decide in this case whether, in the event of the bankruptcy of a party entitled to notice, the holder is bound to endeavor to find out his assignees; nor is it necessary to say what would be the case, if such a party's house was shut up, and there were no means afforded there of discovering him or his representatives; for, in this case, the bankrupt's house continued open; the agent of his representatives, the messenger, who was also in some degree his representative, was there, and a notice there would have reached the assignees, etc." (*Rohde v. Proctor*, 4 B. & C., 517, 523.)

Since the decision in that case, it has usually been laid down in the books that before the appointment of assignees there should be notice to the bankrupt, or to the messenger or registrar (in England), and, after the appointment, to the assignees. In a late case, it is held that notice to the bankrupt will in all cases be enough, whether the assignees have been appointed or not. (*Ex parte Baker*, L. R., 4 Ch. D., 795.)

I suppose the result of the decisions is that notice may be given either to the assignees or to the bankrupt, as the holder may find most convenient.

Whichever way it is taken, there would be no necessity for notice here, because the same person is assignee of both the

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bankrupts ; and as to the bankrupts themselves, if they remain capable of receiving notice, they must retain their right to waive it or their liability to having it taken for granted. See also, as directly in point: *Fuller v. Hooper* (3 Gray, 334).

Debt admitted to proof.

SUPREME COURT—NEW HAMPSHIRE

A bankrupt may continue to prosecute an action pending at the time of adjudication where the cause of action is one which does not pass to the assignee.

Where the cause of action is one which passes to the assignee, he should be notified and, in case of his refusal, the action must be dismissed. An order that a nonsuit be entered in case the assignee did not appear within a specified time, held to be erroneous.

TOWLE v. DAVENPORT.

At the April Term (1875) of the Circuit, the suggestion of plaintiff's bankruptcy was entered upon the docket, and thereupon the defendant moved that the action be dismissed. No order was made upon that motion. At the October Term the motion was renewed, and the Court ordered that a nonsuit be entered at the next January Term, unless the assignee in bankruptcy should appear to prosecute the action by entering such appearance upon the docket within thirty days from the close of the October Term. To this order the plaintiff excepted.

Mr. Wood, for the plaintiff.

Mr. Locke, for the defendant.

SMITH, J.—By the 14th Section of the Bankrupt Act of 1867, all the estate of the bankrupt vests in the assignee from the commencement of the proceedings in bankruptcy (with the exception of certain property specially exempted), including choses in action, debts due the bankrupt, and rights of action ;

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and the assignee is empowered to sue for and defend all such property and rights, and prosecute and defend all suits in favor of or against the bankrupt, pending at the time of the adjudication of bankruptcy. Notwithstanding the broad provisions of the statute, there are certain contracts entered into with the bankrupt which clearly will not pass to the assignee—as, for example, a contract to marry, a contract for the services and instruction of an apprentice, contracts generally for the personal services of the bankrupt, pensions granted for military services, contracts respecting trusts, and contracts which are a burden instead of a benefit to the estate of the bankrupt. (*Streeter v. Sumner*, 31 N. H., 542.)

So also an action, or right of action, in relation to property set apart to the bankrupt as exempt, would not pass to the assignee, and the bankrupt might continue to prosecute such action as well after as before bankruptcy. (*Scott v. Wilkie*, 65 N. C., 376; Bump on Bankruptcy, 5th ed., 349.) Whether the same would be the case if the assignee should refuse to adopt and prosecute a suit commenced before bankruptcy in relation to property or rights, which would otherwise vest in the assignee, is a question not raised by the exceptions before us.

It does not appear whether this action is one of which the subject-matter passed to the assignee. Unless it did, the bankrupt clearly has the right to prosecute it without interference from the assignee.

But if it be assumed that the action is one that passed to the assignee, he has his election whether or not to prosecute it. In the event of his refusal so to do, it must of course be dismissed. But if the assignee should appear and claim the right to prosecute the suit, he would clearly be entitled so to do, upon giving security for costs. In order that a suit may not be dismissed without his knowledge, the better practice would be to issue a *scire facias* or order of notice on him to come in and prosecute, as is required to be done to an administrator upon the death of his intestate. (Gen. Stats., Ch. 179, Sec. 11, and Ch. 207, Secs. 16, 18.) The order of the Circuit Court, that a nonsuit be entered at the next term, unless the assignee

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should cause his appearance to be entered upon the docket within thirty days from the close of the term, would practically avail nothing to the assignee, unless brought to his knowledge.

If a nonsuit is ordered, the defendant would ordinarily have judgment for his costs. But the plaintiff cannot prosecute the suit further, because by law he is divested of all interest in it. It would be unreasonable to subject him to costs for not prosecuting a suit which the law will not allow him to prosecute, but vests exclusively in another as his representative. The proper course under such circumstances would seem to be to order the action dismissed. I think the order should be that the action be dismissed, unless the assignee appear at a given time and prosecute the same, and the defendant should be required to serve the order upon the assignee within such reasonable time as the Circuit Court may limit.

LADD, J., concurred.

CUSHING, C. J.—The effect of the Bankrupt Law appears to be to make the assignee a trustee, his trust being in the first instance to pay the expenses of the proceeding, then the debts of the bankrupt, and finally, if anything remains, to hold it for the use of the bankrupt, and to pay it over to him.

I do not find any such express enactment as to the residuum, if any, in the present Bankrupt Law, but I think that must be the effect of it. If the defendant in the suit desires to protect himself from the assignee's claim upon him, he should be permitted to do so, by causing the assignee to have notice to come in and take upon himself the prosecution of the suit.

It may be that for some sufficient reason the assignee does not interfere.

Perhaps the creditors will not indemnify him against the expense of the proceeding. And yet there may be in the suit valuable claims which, if the creditors will not assert them, ought to belong to the bankrupt. After the assignee, having been by order of the court duly summoned in to take upon himself the conduct of the proceedings, has neglected to do so, justice requires that he should be held to have abandoned the

 In re Bousfield & Poole.

claim, which thereafter should stand in the same position as any residuum which might be left after payment of all the expenses and debts of the bankruptcy, *i. e.*, should be held to belong to the bankrupt, and he should be permitted to prosecute the claim for his own benefit.

Exceptions sustained.

 UNITED STATES DISTRICT COURT—N. D. OHIO.

A sale of stock to a creditor who holds it as collateral security for ten dollars per share when it is worth twenty-five dollars per share, will be set aside for inadequacy of price, and a resale ordered.

In re BOUSFIELD & POOLE.

Application to set aside a sale of stock. The facts appear in the register's opinion.

J. M. Henderson, for assignee and exceptors.

Charles E. Pennewell, for creditors.

OPINION OF REGISTER.

Diodate Clark, Caroline Kellogg, and Kitty Clark, are creditors of Bousfield & Poole as follows:—

Diodate Clark.....	\$10,283 50
Caroline Kellogg.....	5,141 00
Kitty Clark.....	2,673 32

As collateral security for the payment of these claims Diodate Clark, for himself and the others, held one hundred and nineteen shares of stock in the Ohio Wooden Ware Company pledged by the bankrupts.

The assignee and the creditors were unable to agree as to what was the value of the stock as provided in Section 5075 of the Bankrupt Act.

In re Bousfield & Poole.

On July 20, 1876, the assignee and these three creditors filed with me a petition in which they state they cannot agree as to the value of the stock; that they believe a public sale would be the best way to determine its value, and ask me to make an order authorizing Diodate Clark, or any agent of his, to sell the stock at private auction to the highest bidder.

In compliance with this request, on July 21, 1876, I made the following order:

“That said Diodate Clark and any authorized agent of his be, and are hereby authorized and empowered to sell said one hundred and nineteen shares of Ohio Wooden Ware Company's stock, at public auction, to the highest and best bidder, on his having published notice of the time and place of such sale for at least ten days prior to the day of sale in the *Cleveland Daily Herald*, and that a report of such sale be made to me in writing, duly sworn to forthwith, after such sale, specifying the amount for which the same sold, and to whom sold.”

See 5 Law Reporter, page 303, for Judge Story's opinion, indorsing the mode of determining the value.

On August 5, 1876, George W. Calkins filed with me his affidavit that, as agent of Diodate Clark, he had caused the stock to be advertised and sold in pursuance of said order, and that the same was sold on August 5, 1876, to Diodate Clark, at and for ten dollars per share, making one thousand one hundred and ninety dollars, and also filed with his affidavit a copy of the notice of sale, with the affidavit of J. H. Faxon, bookkeeper for the *Cleveland Herald*, that said notice was published in the *Cleveland Herald* for ten days prior to the day of sale.

To this sale, on October 4, 1876, Frank W. Parsons, representing J. B. Hervey, a creditor of said bankrupts' estate, filed objections which are embodied in a statement duly sworn to by him, and are in substance as follows:

That the sale of the stock was advertised to be held at the office of the Ohio Wooden Ware Company on August 5, 1876, between the hours of nine and ten A.M. He attended at the place named to bid on the stock, and was ready and willing to bid and pay for said stock the sum of twenty-nine dollars per share,

In re Bousfield & Poole.

but was informed the same had been sold for ten dollars per share.

That about two or three weeks before said sale he had stated to G. W. Calkins that he would make him a standing offer for the stock of thirty-nine dollars per share, as it then stood, but that afterwards and before the sale a dividend had been declared reducing its value to twenty-nine dollars per share.

The matter remained in this condition with the expectation on my part, for some time, that it would be adjusted, and then was overlooked until October 31, 1877, when I entered an order for a hearing on November 2, 1877, and served notices thereof on all parties.

November 2, 1877, the parties all appeared, and I proceeded to take the testimony of the following-named witnesses, in regard to the matter, viz.: Frank W. Parsons, J. M. Gorham, William C. Stahle, J. B. Hervey, George W. Calkins, Thomas F. Crotty, and Wm. Waterman, which testimony was all reduced to writing, and is herewith returned.

In my judgment the testimony taken establishes fully the following:

1st. That the sale of the stock was made at twenty minutes before ten o'clock A.M. on the 5th day of August, 1876.

2d. That it was conducted in the usual and ordinary way, in full compliance with the requirements of the order, and that every person connected with the sale acted honestly and in good faith.

3d. That the stock sold for ten dollars per share, where in fact its real value was twenty-five dollars per share.

So that in my judgment there is no reason to set aside the sale and order a new one, unless the inadequacy in price at which it sold, as compared with its real value, is a good reason to do so.

The rule in England, as I understand it, is that a sale will not be set aside upon the ground of gross inadequacy of price, unless an agreement with bond is given to pay more.

I am cited to a case in 4th W. Va. Reports, page 600. *Sinnott v. Cralle*, in which it was held as follows:

In re Bonafield & Poole.

“A sale of 1,700 acres of land for less than \$5,000, will be set aside for inadequacy of price, upon affidavits of ten persons that the actual value was twice or thrice that sum.”

But I do not understand this to be the rule in this country, nor do I think the weight of authority supports this rule. I understand the rule to be as laid down in 62 Barbour, page 280, *Kellogg v. Howell et al.*, viz.:

“A sale under a judgment will not be set aside in the absence of fraud, surprise, or well-grounded misapprehension, simply because a higher price can be reasonably anticipated on a resale of the premises.”

But I am inclined to think that this general rule does not prevail in a bankruptcy proceeding, where the court by its officers hold the estate for the benefit of all the creditors, and is required to look to the protection of the interests of all with great care. By repeated rulings, both under the Bankrupt Law of 1841, as well as the Bankrupt Law of 1867, this principle has been recognized, and to such an extent it would seem that a greater responsibility is thrown upon a bankruptcy court in that respect than upon an ordinary court of chancery.

In Ninth ed. Bump, p. 168, the author states as follows:

“The court on application of any party in interest has complete supervisory power over such sales” (sales by assignees and officers of court), “including the power to set aside the same and order a resale, so that the property sold may realize the largest sum.”

Judge Dillon, in the matter of O’Fallon (2 Dillon’s C. C., 548), held as follows: “Where a public sale of the real estate is made by the assignee in bankruptcy, under the order of the Bankruptcy Court, and the property is struck off to the highest bidder, such sale is subject to the approval of the court, which has a discretion to refuse to confirm it for a mere inadequacy of price. It is not necessary that there should be fraud, or such gross inadequacy of price as to be evidence of fraud.”

Because of these authorities, and especially because of the decision of Judge Dillon above quoted, and for the reason that the one hundred and nineteen shares of stock sold for ten dol-

In re Matot et al.

lars per share, when the testimony shows that it was in fact worth twenty-five dollars per share, I recommend that an order be entered that the sale of the stock be set aside, and that another sale of it be ordered.

It will be observed that this is a case where the rights of a third party, who has in good faith paid his money, do not intervene, the stock having been bid off by the creditor who held it as collateral security.

There being opposition to this, I certify the same to your honor for determination.

M. R. KEITH, *Register in Bankruptcy.*

CLEVELAND, November 9, 1877.

WELKER, J.—I have examined with care the foregoing opinion of M. R. Keith, register, and considered the arguments and authorities submitted by counsel in this case, and fully concur in the opinion as above given, and direct that an order be entered setting aside the sale in accordance with the recommendation of the register, and ordering another sale to be made.

UNITED STATES DISTRICT COURT—VERMONT.

NOVEMBER 14, 1877.

Where the requisite number of creditors join in a petition against a firm, it is not necessary that they should all be creditors of the firm.

The taking of partnership property, when the firm is insolvent, to pay a debt not a debt of the firm, although each of the partners may be liable for it, is an act of bankruptcy.

Where the requisite number of creditors have signed the petition, an adjudication will not be set aside on the ground that such petition was procured by the bankrupts as an involuntary one to avoid the necessity of procuring the assent of the necessary number of creditors in case of a deficiency of assets; there can be no legal fraud in procuring an adjudication on involuntary proceedings unless it should be followed by a discharge that could.

In re Matot et al.

not be had on voluntary proceedings. An adjudication by default can only be opened at the instance of a party to the default.

In re E. L. MATOT & CO.

WHEELER, J.—This is a petition brought by several creditors of the bankrupts, setting forth in substance that the adjudication of bankruptcy of the bankrupts, heretofore made, was upon a creditor's petition; that the petitioning creditors were not, in fact, creditors of the firm; that the requisite number and amount did not join in the petition; that the acts of bankruptcy alleged did not in fact exist; and that the petition was procured by the bankrupts themselves as an involuntary one to avoid the necessity of procuring the assent of one-fourth in number, and one-third in value of the creditors to a discharge in case of a deficiency of assets for the purposes of a discharge on a voluntary petition, and praying that the adjudication be set aside. The petitioning creditors and the bankrupts have answered this petition, and it has been heard on the petition, answers, proofs, and argument of counsel.

Upon the proofs it may be somewhat doubtful whether both of the petitioning creditors are creditors of the firm to any amount at all, and if they are to any amount whether they are so as to all the claims set forth in their petition; but it does appear that one of them is a firm creditor to some amount, and that the other is an individual creditor, at least of one of the firm to some amount. By Sec. 5121, Rev. Stat. U. S., two or more persons who are partners in trade may be proceeded against on the petition of any creditor of the partners, and the partnership property applied to the payment of partnership, and the individual property to the payment of individual debts. This sufficiently shows that, if there was a sufficient number joined, the proceeding was a proper one as to both the firm and its members, and that under it there can be no appropriation of firm property to the payment of any other than firm creditors. It does not appear whether the requisite number did join or not, for it does not appear to what amount, if any, there are creditors other than the originally petitioning, and these petitioning creditors;

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and if these are all there are, these now petitioning were secured by attachment, and not entitled to be counted, and the requisite number did join. But whether they did or not it is conceded that the lack in number was not such as that this petition should prevail on that ground alone, and the establishment of the sufficiency in number establishes the propriety of proceeding against the firm, because, as before stated, they were proceeded against by at least one firm creditor. If firm property could be applied to individual debts before satisfying firm debts there would be more force to an objection that the petitioning creditors were not all firm creditors, but as such property cannot be so applied, and there is no question of distribution here now, it can have but little force.

It does appear that partnership property was taken to pay a debt, not a debt of this partnership, strictly speaking, although it may be that each of the partners was liable for it, when the firm was insolvent, which constituted an act of bankruptcy within clause the seventh, Sec. 5021, Rev. Stat. U. S. So that one of the acts of bankruptcy alleged did in fact exist.

If there was the requisite number of creditors to the petition, there could be no fraud by the proceeding on the ground of the want of them in respect to procuring a discharge without the requisite amount of assets, or the assent of the requisite number of creditors to entitle the bankrupts to a discharge, although they may have been instrumental in instituting the proceedings. And as it does not appear but that there was the requisite number, the foundation on which the fraud in this respect would rest does not appear on which to grant the petition, if that would be sufficient ground for granting it.

Generally, the grounds on which such an adjudication can be set aside must be exceedingly few, if they exist at all in favor of creditors not parties.

Of course a default, on which an adjudication was founded could be set aside in favor of the party defaulted for the same reasons that other defaults are set aside in favor of like parties, and new trials could be granted in bankruptcy proceedings in favor of parties to the former trials as in other proceedings. This

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adjudication was on a default, in proceedings substantially regular. The parties defaulted are satisfied. The law, whether justly or unjustly, required no notice to any others. They were not parties to the default, and as such, have no standing place to have it opened. The law goes further than to leave the finality and conclusiveness of the judgment to the ordinary rules pertaining to similar adjudications, and expressly declares that it shall be final (Act, June 23, 1874, 218, Sec. 13). In the eye of the Bankrupt Acts, however it may be practically, it is no loss to creditors for their debtors to be adjudged bankrupts in bankruptcy proceedings, of which they have any right to complain. If the debtors turn out to be solvent, it is supposed that they will be paid in full, which is all they could ask; if insolvent, that they will be paid their ratable share with the others, which is all they can, justly to the others, claim. Hence, any person owing provable debts exceeding three hundred dollars in amount, may file a petition and be adjudged a bankrupt, and have his estate settled in bankruptcy proceedings, without making any creditor a party till after the adjudication (Rev. Stat. U. S., Sec. 5014). So the debtor is supposed to be the only one interested in the question, whether he shall be adjudged a bankrupt or not in involuntary proceedings, and, in that view, the law provides for a trial in respect thereto between him and the petitioning creditors; and it emphasizes the result, as before mentioned, by providing that the judgment shall be final, as if to exclude interference up to that stage of the proceedings by others. As the Bankrupt Law contemplates the proceedings there could be no legal fraud in procuring an adjudication, unless it should be followed by a discharge that could not be had on voluntary proceedings. No intimation that collusion between a debtor, and less than the requisite number of his creditors, to procure his discharge without the co-operation of the requisite number, and without the necessary amount of assets, would be successful beyond remedy is intended. Perhaps his procurement of such proceedings, for such a purpose, would be good ground for refusing his discharge, which would be all he could gain, or any of his creditors lose, beyond what he could

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have on his own petition; and perhaps there would be other remedies. To point them out is not the present purpose. In this case it does not appear that there would be a deficiency of assets such as to make an involuntary petition preferable for the bankrupts to a voluntary one; and without that it would be difficult to find collusion to avoid it.

These now petitioning creditors, who, it seems to be considered, are partnership creditors, can have the partnership and individual creditors distinguished from each other, and the partnership and individual assets marshalled for their payment, and a discharge refused, if just grounds exist, and in that way obtain all that in view of the law, as it stands, and its purposes they are entitled to, without disturbing the judgment they complain of. The petitioners in this proceeding claim costs; but it is not clear that any are taxable. It is not a suit in which judgment can be rendered one way or the other; but is an application addressed rather to the discretion of the court. It may be that costs are taxable on such proceedings in the discretion of the court; but if so they are not taxable of right, probably, and, under the circumstances, none are attempted to be awarded.

The petition is dismissed.

UNITED STATES DISTRICT COURT—N. D. OHIO.

The taking of a bill of sale of logs purchased with money furnished by the creditor is not a preference unless it appears that such bill of sale included more than the creditor was entitled to.

An intent to gain a preference, accompanied by acts to accomplish it, but which entirely fail, so that no preference is received, does not come within the provisions of the Bankrupt Act, which impose penalties upon creditors who knowingly receive a preference.

All transactions to prefer a *bona fide* creditor come within the four months' clause of Section 5128; the six months' clause applies to other creditors.

In re The Bousfield & Poole Manufacturing Company.

An effort to secure an honest debt from a failing creditor is not an actual fraud within the meaning of Section 5021.

In re THE BOUSFIELD & POOLE MANUFACTURING COMPANY.

In the matter of exceptions filed by the assignee to the claim of the Ohio Wooden Ware Company.

The Bousfield & Poole Manufacturing Company made an assignment under the State Law to J. A. Reddington for the benefit of its creditors.

On March 6, 1876, the Bousfield & Poole Manufacturing Company filed a voluntary petition in bankruptcy, and on March 8, 1876, was adjudged bankrupt.

On September 26, 1877, the Ohio Wooden Ware Company proved in the usual form its claim on two notes, made by bankrupt, on which there was claimed due at the time of filing of the petition the sum of five thousand two hundred and ninety-two dollars and thirty-three cents.

To this claim the assignee on September 27, 1877, filed exceptions, and asked that the claim be expunged for the reason:

That, upon the books of the bankrupt, the Ohio Wooden Ware Company appear to be indebted to said bankrupt in a large sum, to wit, over thirteen thousand dollars.

Issue was joined and the following questions arose:

1st. Whether the Bousfield & Poole Manufacturing Company has a set-off against the claim of the Ohio Wooden Ware Company.

2d. Whether the Ohio Wooden Ware Company received an unlawful preference by the purchase of logs of bankrupt on September 8, 1875.

3d. Whether the Ohio Wooden Ware Company received an unlawful preference by the purchase of zinc of bankrupt, on October 23, 1875.

4th. Whether the Ohio Wooden Ware Company received an unlawful preference by the purchase of bankrupt of merchandise and manufactured articles, consisting of glue, washboards, woodenware, and other articles, in October, 1875.

In re The Bousfield & Poole Manufacturing Company.

C. B. Bernard, assignee in person.

Charles E. Pennewell and *Benjamin R. Beavis*, for the Ohio Wooden Ware Company.

OPINION OF REGISTER.

The first defence set up by the assignee is that there is existing upon the books of the bankrupt, an account which shows a balance due from the Ohio Wooden Ware Company, of more than sufficient to cancel its claim in this case, viz. :

On Ledger "C," page 53, a balance of....\$10,919 53

On Ledger "C," page 179, a balance of... 2,547 54

Total, \$13,467 07

The testimony taken in the case shows substantially this state of facts in regard to these accounts.

Under date of September 8, 1875, there is a charge against the Ohio Wooden Ware Company for

250,000 feet of White Pine Timber, at \$10.75..... \$2,687 50

1,000,000 feet of White Pine Timber, at \$13.75... 13,750 00

Total, \$16,437 50

which amount went to make up the balance on Ledger C, page 179, of two thousand five hundred and forty-seven dollars and fifty-four cents.

Mr. J. M. Gorham testifies, that of this amount of timber so charged at thirteen dollars and seventy-five cents per thousand, there was six hundred and eleven thousand two hundred and twenty-five feet which was never received by the Ohio Wooden Ware Company, and amounted to eight thousand four hundred and four dollars and forty-four cents.

There is no testimony to contradict this, and I think the amount should be deducted.

Under date of October 23, 1875, there is a charge against the Ohio Wooden Ware Company, for

43 Casks of Sheet Zinc.....\$5,512 27

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It is agreed by the parties that this zinc was replevined by May & Co., of Boston, of whom it was purchased by the Bousfield & Poole Manufacturing Company, claiming that it was obtained from them by fraud, by the Bousfield & Poole Manufacturing Company, and that no title passed to either the Bousfield & Poole Manufacturing Company, or to the Ohio Wooden Ware Company; that a verdict was rendered in said case for May & Company, upon which a judgment was rendered, which is still in full force.

From this it seems that the Ohio Wooden Ware Company obtained no title to the zinc charged against them, and received no benefit therefrom, and although the charge was proper at the time, it should be now stricken out, or a corresponding credit made.

Under date of August 7, 1875, there is a charge against the Ohio Wooden Ware Company for two notes:

One for.....	\$2,597 50
And the other for.....	2,611 66
	Total, \$5,209 16

It is admitted by the parties, and the proof shows that these two notes are the two notes upon which the Ohio Wooden Ware Company makes proof of its claim in this case.

Upon this state of facts the account would, in my opinion, stand as follows:

OHIO WOODEN WARE COMPANY, *Dr.*

Balance on Ledger "C," page 53.....	\$10,919 53
Balance on Ledger "C," page 179.....	2,547 54
	\$13,467 97

OHIO WOODEN WARE COMPANY, *Cr.*

By deficit on Timber.....	\$8,404 34
By amount charged for the Zinc .	5,512 27
	\$13,916 61
Leaving a balance due the Ohio Wooden Ware Company of.....	\$459 54

In re The Bousfield & Poole Manufacturing Company.

besides the amount due on the two notes embraced in the proof of claim.

I am therefore of the opinion that no set-off exists against either one of these notes.

The second defense set up by the assignee is, that on the 8th day of September, 1875, the claimant, knowing that the bankrupt was insolvent, purchased of it timber and logs of the value of sixteen thousand four hundred and thirty-seven dollars and fifty cents, and thereby obtained an illegal preference, and that by reason thereof they are not entitled to prove only a moiety of their claim.

The testimony shows that an arrangement was entered into between the bankrupt and the claimant for the purchase of logs, by which it was arranged and understood that the Ohio Wooden Ware Company should furnish the Bousfield & Poole Manufacturing Company with money to buy logs for both, it being understood that the Bousfield & Poole Manufacturing Company were to have about two-thirds of the logs, and the Ohio Wooden Ware Company about one-third of them. The logs were purchased by and in the name of the Bousfield & Poole Manufacturing Company, and when brought to Cleveland were landed upon the dock of the Bousfield & Poole Manufacturing Company, that company having a dock and hoisting apparatus, and the Ohio Wooden Ware Company having none. From this pile of logs each would use as their necessities required, keeping an account of the amount used in what is called a log account.

On the 8th of September, 1876, the Ohio Wooden Ware Company took from the Bousfield & Poole Manufacturing Company a bill of sale of all the logs remaining upon the dock, knowing at the time that the Bousfield & Poole Manufacturing Company was insolvent.

It is evident from the testimony that the Ohio Wooden Ware Company furnished the money to the Bousfield & Poole Manufacturing Company for the purchase of logs for them, and with the understanding that the logs were to be delivered to them on the dock of the Bousfield & Poole Manu-

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facturing Company at the cost thereof, and when delivered there they were entitled to take as many logs as the money which they had furnished had paid for. The logs were purchased on joint account, and in case no division had taken place before the bankruptcy the assignee could have been required to give an account to the Ohio Wooden Ware Company for the full amount of their interest in the logs. A separation of the interest of the Ohio Wooden Ware Company was made by the bill of sale on September 8, 1875.

I think the testimony shows, and it seems to have been the understanding of the parties, that the Ohio Wooden Ware Company were the owners of so much of the logs as their money paid for. As the testimony does not show that the bill of sale was given to them for any more logs than they were entitled to, I am of the opinion that in taking the logs they received no preference, but only took what they had paid for, and that which in law belonged to them.

The record shows that this is a voluntary petition, filed on March 6, 1876; the alleged preference occurred five months and twenty-eight days before the filing of the petition. I do not think that the testimony exposes any actual fraud, so as to bring it within the construction given by the courts to the six months' provisions contained in Section 5129.

The third defense set up by the assignee is, that on the 23d day of October, 1875, the claimant, knowing that the bankrupt was insolvent, purchased of it forty-three casks of sheet zinc of the value of five thousand five hundred and twelve dollars and twenty-seven cents, and thereby obtained an illegal preference, and that by reason thereof they are not entitled to prove only a moiety of their claim.

The testimony fully establishes that the officers of the Ohio Wooden Ware Company, at the time they received this zinc, knew that the Bousfield & Poole Manufacturing Company was insolvent; that they took it in payment of a pre-existing debt, and more than four months before the filing of the petition in bankruptcy, no consideration being paid at the time.

The testimony further shows that the Bousfield & Poole

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Manufacturing Company, at the time it transferred the zinc to the Ohio Wooden Ware Company, had no title, and conveyed no title, to the Ohio Wooden Ware Company, so that the Ohio Wooden Ware Company although it sought to obtain a preference, did not, in fact, obtain any.

The Bankrupt Act, Section 5084, provides that any person who has accepted a preference shall not prove his claim, etc.

Section 5021 provides, that if the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended, such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt.

The intent to obtain a preference accompanied by acts to accomplish it, but which entirely fail, so that no preference is received, does not, in my opinion, come within those provisions of the Bankrupt Act which impose penalties upon creditors who knowingly *receive* a preference.

The fourth defence set forth by the assignee is that the Ohio Wooden Ware Company received an unlawful preference, by the purchase from the bankrupt of merchandise and manufactured articles, consisting of glue, wash-boards, woodenware, and other articles, in October, 1875.

It will be seen on examination of the testimony that no evidence was offered to sustain this allegation.

A question arises as to whether any of these alleged preferences occurred within the time specified by the Bankrupt Act, which permits or requires the court to pronounce them fraudulent.

They all occurred more than four months before the filing of the petition, and were acts to secure or pay a then existing creditor.

The courts seem to have held that all transactions to prefer a *bona fide* creditor come within the four months' clause, Section 5128:

"After the lapse of four months the preferences—simple preferences—which an insolvent debtor may have made, are to

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be held valid as against all the world so far as the preferred creditor is concerned."

See cases cited, ninth edition of Bump's Bankruptcy, pages 799 and 800.

The six months' provision is held by the courts not to apply to cases arising between the bankrupt and a *bona fide* creditor, but between the bankrupt and others.

See ninth edition of Bump's Bankruptcy, pages 828 and 829, and cases there cited: especially *Bean v. Brookmier* (4 N. B. R., 196); *Gibson v. Warden* (14 Wall., 244); *Hubbard v. Allaire Works* (4 N. B. R., 623); *Babbitt v. Walbrun* (4 N. B. R., 121).

Still another question arises, and that is whether a creditor who, more than four months before the bankruptcy, received a preference, knowing that the bankrupt was insolvent, can prove his claim for more than a moiety.

Section 5021 provides:

"And such person (that is, the person receiving a payment or conveyance) if a creditor, shall not, in cases of actual fraud, be allowed to prove for more than a moiety of his debt."

There is nothing dishonest or illegal in a creditor securing a debt due him from a failing debtor. He may take payment or security, knowing the insolvency, and there is no dishonesty or actual fraud in it. If, however, within the three months bankruptcy proceedings intervene, he may lose the payment or security thus honestly taken. If, however, the three months expires, his title to the payment or security taken has become perfect. But does the penalty prohibiting him from proving but a moiety of his claim remain? The statute in terms makes no limitation, but provides that no creditor shall, in case of *actual fraud* on his part, prove but a moiety of his claim. I can find no case deciding this question, but am inclined to the opinion that in cases of *actual fraud* this penalty remains. But what is the *actual fraud* specified? It is something more, in my opinion, than an effort to secure an honest debt. It contemplates some act of the creditor's which is actually fraudulent at the time it is committed. It does not, in my opinion, em-

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brace the act of a creditor who attempts by proper and ordinary effort to secure an honest debt—which act may afterward become a legal fraud by reason of the filing of a petition and adjudication in bankruptcy.

“A mere fraud on the Bankrupt Law by accepting a preference in violation of its provisions is not an actual fraud.” (*In re John Riorden*, 14 N. B. R., 332.)

In my judgment the act of the Ohio Wooden Ware Company in obtaining the payment was honest at the time, and no actual fraud was committed by it so as to prevent it from having its entire claim in this case.

I therefore recommend that the petition and exceptions filed by the assignee be dismissed, and that the claim be allowed.

M. R. KEITH, *Register*.

Cleveland, October 19, 1877.

WELKER, J.—I have carefully examined the foregoing opinion of M. R. Keith, register, and considered the arguments and authorities submitted by counsel in this case, and fully concur in the opinion of the register, and direct that an order be made dismissing the petition and exceptions filed by the assignee; and that an order be made requiring the assignee to pay to the above-named creditor such dividend as other creditors of the same class may be entitled to receive.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

JANUARY, 1877.

A former partner or a joint covenantor with the bankrupt, who is liable for joint debts and pays them, may prove the amount against the assets of his former partners or co-contractors.

A claim by retired partners for unliquidated damages, by reason of their liability under the provision of a lease to the firm, that in case of failure to perform the lessors may re-enter and relet the premises at the risk of the lessees, who should remain liable for the rent, and be credited with the

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sums actually realized, cannot be proved against the estate of their former partners.

Ex parte F. J. LAKE et al. In re WHITING, McKENNA & CO.

IN September, 1873, William O. Tebbetts and Charles Haley demised certain chambers on the corner of Summer and Kingston Streets, in Boston, to F. J. Lake, Sidney Cushing, Franklin B. Daniels, and J. E. K. Herricks, for the term of five years from October 1, 1873, by an indenture under seal; and the lessees entered into the usual covenants for payment of rent, etc. The lessees composed the mercantile firm of Lake, Daniels & Cushing, to whom was soon after added one Bliss, and they had Albert T. Whiting as a special or limited partner. Afterwards J. McKenna bought out Mr. Bliss, and on or about January 1, 1875, the firm was dissolved, and a new firm, called Whiting, McKenna & Co., was formed, to carry on the same business at the same place. By this arrangement Lake and Daniels retired, and Whiting became a general partner; so that the new firm consisted of A. T. Whiting, James McKenna, S. B. Cushing, and J. E. K. Herrick. By an indenture dated December 2, 1874, the old firm conveyed all the joint property, including leases, to the new firm; and the latter assumed the debts and liabilities, and covenanted to indemnify Lake and Daniels therefrom. After the indenture was made, but before the new firm began business, P. G. Leonard was admitted as a partner, and verbally undertook all the obligations of that position. The new firm occupied the chambers for the prosecution of their joint business, and paid the rent out of their joint assets. In March, 1876, proceedings in bankruptcy against Whiting, McKenna & Co. were begun in this court, which are still pending.

The lessors have proved against the joint assets the arrears of rent due them at the time of the bankruptcy. Lake and Daniels now offer for proof, as unliquidated damages, the amount which they allege that they shall be obliged to pay under their covenants in the indenture of lease. This instrument contained the follow-

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ing clause: "Provided always, and these presents are upon this condition, that if the said lessees or their representatives or assigns do or shall fail to perform any or either of the covenants contained in this instrument, which are on their part to be performed, or if the said lessees shall be declared bankrupt or insolvent according to law, or if any assignments shall be made of their property for the benefit of creditors, then, and in either of said cases, the lessors, or those having their estate in the premises lawfully, may immediately, or at any time thereafter, and while such neglect or default continues, and without further notice or demand, enter into and upon the said premises, or any part thereof; in the name of the whole, and repossess the same as of their former estate, and expel the lessees or those claiming under them, and remove their effects (forcibly if necessary), without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be had for arrears of rent preceding breach of covenants; and thereupon the lessors may at their discretion re-let the premises at the risk of the lessees, who shall remain for the residue of said term responsible for the rent and taxes herein reserved, and shall be credited for such amount only as shall be by the lessors actually realized."

The lessors have re-entered and re-let the premises at a reduced rent, the land having fallen in rental value; and the solvent lessees ask to prove the total amount of the deficiency calculated to the end of the term.

A. A. Ranney and Brooks, Ball & Storey, for the creditor.
R. M. Morse, Jr., for the assignee.

LOWELL, J.—I have no doubt that a former partner, or a joint covenantor with the bankrupts who is liable for joint debts, and pays them, may prove the amount against the assets of his former partner or of his co-contractors. (*Ex parte Young*, 2 Rose, 40; *Ex parte Taylor*, id., 175; *Ex parte Carpenter*, Mont. & McA., 1; *Wood v. Dodgson*, 2 M. & S., 195; *Affalo v. Foudrinier*, 6 Bing., 306; *Ex parte Ogilby*, 3 Ves. & B., 133; *Butcher v. Forman*, 6 Hill, 583.) The decision in

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Massachusetts, that a retired partner could not prove for debts which he had paid after the beginning of the bankruptcy, was put upon the ground that the insolvent law provided only for sureties in the strict sense (*Morton v. Richards*, 13 Gray, 15); a somewhat narrow construction, considering that such a partner is so far a surety that the creditor will discharge him by giving time to the remaining partners, with knowledge that they have assumed the debt. (*Oakely v. Pasheller*, 4 Clarke & F., 207.) Our statute does not raise so nice a point, because it follows the English law, in giving not only to sureties, but to all "persons liable" for the bankrupt, the right of proof; and this phrase undoubtedly includes retired partners.

If the lessors in this case have a claim for unliquidated damages which they do not choose to offer in proof, then, under rule 30 of the Supreme Court, the retired partners may offer it in the name of the lessees.

After reflection and consideration, I regret to find that, in my opinion, the liability is not one which can be proved. If the contract were a little different, and provided merely that the lessees should pay any loss or damage consequent upon the diminished value of the premises, the amount would be capable of ascertainment with sufficient certainty. (*Ex parte Llynvi Coal Company, L. R.*, 7 Ch., 28.) I intimated in *Ex parte Houghton*, (1 Lowell, 554, 557,) that our leases might provide by stipulation for a case of this kind, and I remain of that opinion, and think it would be wise to adopt such a practice. But I am unable to reach the conclusion that the stipulation in this case is calculated to work out the result. It seems to provide that the lessees, after a breach, shall remain liable for the rent precisely as before, excepting that they are to be credited with any sums actually received for the use of the premises. This brings the case, unfortunately, within the numerous decisions concerning rent which, not accruing at once, cannot be estimated beforehand. The original lessees, therefore, would not be liable for a gross sum at any time, nor could we ascertain, with any certainty, what sums they will be entitled to have credit for during the remainder of the term. Proof rejected.

In re Odell et al.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

NOVEMBER 27, 1877.

The mere fact that the bankrupt has been refused a discharge for a cause set forth in Section 5110 is not an absolute bar to a composition.

The District Court is not deprived of jurisdiction to entertain proceedings for a composition by the fact that a petition to review an order refusing to discharge the bankrupt is pending in the Circuit Court.

In such case the bankrupt should be required to pay the opposing creditor the expenses and disbursements, other than counsel fees, incurred in opposing the discharge, as a condition of and prior to the confirmation of the composition.

A composition of five per cent. sustained where there appeared to be no assets of any value, and no probability of any dividend through an assignee, and the parties were acting in good faith.

In re ALBERT S. ODELL and EDGAR ODELL.

G. A. Siexas, for the bankrupts.

E. Mitchell, for the creditor.

BLATCHFORD, J.—The mere fact that the bankrupts have been refused a discharge in bankruptcy, on a specification of objection, for a cause set forth in Section 5110, is not an absolute bar to a composition. A discharge discharges a bankrupt from his debts, whether there are or are not any assets for distribution. Under a composition, a sum of money is paid in satisfaction of the debt. The debts are not discharged. They are paid and satisfied, with the assent of the creditors. The resolution of composition, when confirmed by the court and recorded, is the resolution of all the creditors, and they all accept what is paid in satisfaction of their debts, by their own voluntary assent, expressed in the manner specified, whether their names are found assenting or not, and whether the amount paid be the full debt or less. A composition not being a discharge, the provisions of Section 5110 in regard to a discharge do not apply to a composition. Nor does the fact, that a peti-

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tion to review the order of this court refusing a discharge, is pending in the Circuit Court, deprive this court of jurisdiction to entertain proceedings for a composition. Under the statutory provisions for composition, the case in bankruptcy is still pending in this court, although such petition for review is pending in the Circuit Court. A rule of this court, made April 25, 1877, provides that "a cause in bankruptcy is not deemed to be finally disposed of until an order is entered in the District Court declaring its termination."

The objection as to the proof of debt and the note of J. H. and C. S. Odell was not taken in the course of the composition proceedings, or in such manner or at such time that they could be heard in regard to it. It was not objected to when offered. The same observations apply to the objection to the letter of attorney of J. H. and C. S. Odell.

The proposed composition is five per cent. in money, on about twenty-five thousand dollars, or about one thousand two hundred and fifty dollars. There is no evidence that this is not as much as the assets can be expected to realize. The only creditor who opposes the composition is the creditor who successfully opposed the discharge. The creditors seem to be acting in good faith for their own interests. There seems to be no assets of any value, and no probability of any dividend through an assignee in bankruptcy. The case is not like that of Hannals in this court (November 9, 1876). There the composition proposed was one-half of one *per cent.*, and it was clearly an attempt by friendly creditors, without any real benefit to themselves, to give to the bankrupt a satisfaction of his debts.

But I think the bankrupts must, as a condition of the confirmation of the resolution, and before it is confirmed, pay to the opposing creditor, Bechet, her expenses and disbursements, other than counsel fees, in opposing the discharge.

In re Falkner.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

DECEMBER 14, 1877.

Where a separate adjudication is made against a bankrupt who is or has been a member of a firm, the separate creditors have a right to vote for the assignee.

In re F. A. FALKNER.

THE assignee in this case was chosen by all the creditors who voted at all; but they were all separate creditors of the bankrupt, and he had been a partner with one Sanborn in a firm which was dissolved some months before the bankruptcy. The only joint debt which was offered was disputed by the bankrupt in good faith and suspended by the Register, and his action was not objected to. At the request of this creditor the Register certified to the court the question whether the separate creditors had a right to vote in the choice of the assignee.

A. G. Briscoe, for the joint creditors.

F. T. Blackmer, for the separate creditors.

LOWELL, J.—When a separate adjudication is made against a bankrupt who is or has been a member of a firm, the courts of equity decided that the joint creditors could only prove their debts for the purpose of assenting to or dissenting from the bankrupt's discharge and of sharing in any joint estate that might come to the hands of the assignees, and in the surplus, if any, of the separate estate. The reason for not permitting them to vote for the assignee appears to have been, that for the purpose of speeding such causes, a general practice had been adopted that only those creditors could choose the assignee who had the right to prove without an order from the Lord Chancellor, and joint creditors could not so prove at the time those decisions were made. (See *Ex parte Taitt*, 16 Ves., Jr.

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193; *Ex parte* Hall, 9 Ves., Jr. 349; *Ex parte* Clay, 6 Ves., Jr. 814; *Ex parte* Chandler, 9 Ves., Jr. 35.)

By these cases it will appear that if a joint creditor was the petitioning creditor, he could not only prove, but vote—an inconsistency with the general rule, which was often observed upon. In law there is no reason why the joint creditors should not vote for the assignee. They are creditors of each partner, and though the assets are to be marshalled in such a way that they may get a smaller dividend than the separate creditors, yet this does not deprive them of the right to be creditors; and it is not according to the true theory of the Bankrupt Law, that the right of a creditor to vote should depend upon questions of this sort which cannot be tried at the first meeting.

The statute of 6 Geo. 4, Ch. 16, Section 62, removed this anomaly and gave the joint creditors their full rights. I do not consider that a statute is necessary in this country, where there is no rule or method of practice which is opposed to it. In truth, when the courts held, and rightly, that joint creditors might petition for adjudication against one partner, and that they might act and sign for or against the discharge, they had decided the other question, excepting, as I have said, for some accidental rule of practice.

There never was a question that the separate creditors could vote in the choice of assignees under a separate adjudication, though the bankrupt had been a partner with others. Where there is a joint adjudication, of course the joint creditors are creditors of each partner, but the separate creditors of one are not, as such, creditors of the others; therefore, the rule was early established and is adopted by our statute, that the joint creditors must choose the assignees.

It has always been the practice in England to permit the separate creditors to choose an inspector, as he is called, who has many of the powers of an assignee, to take care of their interests, when there seemed occasion for it; and we arrive at the same result by giving the court power to appoint additional assignees.

The rule, however, ceases with the reason of it, and does

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not apply when the late partners are severally bankrupt. The courts simply take the case as it is. An individual is bankrupt and all his creditors vote for his assignee. I have never seen a case in England or America that decides that the separate creditors cannot vote.

Cases were cited which show a diversity of opinion upon some points of the settlement of bankrupt partnerships; but I have seen none which holds that in a collateral matter not arising on a petition to stay proceedings or anything of that sort, the court is to go into any such matters.

If there are any joint debts in this case, which is denied by the bankrupt, they may be proved, though they cannot, unless under very peculiar circumstances, share in the separate estate until the separate creditors have been fully paid.

The assignee was voted for by all the separate creditors, and under the rules above set forth was duly chosen.

Choice of assignee confirmed.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

MAY 25, 1877.

A prior adjudication is always available against the defeated party, when made in a competent jurisdiction, and upon a controversy actually decided in that adjudication.

Where, in a proceeding to distribute a particular fund, the court adjudges that securities held by certain creditors are preferential, and decrees that such creditors be debarred from participating in such distribution, such adjudication is conclusive upon the creditors specified.

In re SIMEON LELAND et al. GOUVERNEUR PAULDING et al., v. JOHN S. PLATT, Assignee, &c. WILLIAM LIBBY, Survivor, &c., v. JOHN S. PLATT, Assignee, &c.

Mr. Davies, for plaintiffs.

Mr. North, for defendant.

JOHNSON, J.—These are statutory appeals from the decision of the District Court, expunging the claims against the estate

In re Leland et al.

of the bankrupts of the persons named as plaintiffs in the cases above entitled. A jury trial was waived in each case, and they were tried before me in part upon written stipulations as to the facts, and are now to be considered upon the substantial question whether the parties claimant are not concluded by certain proceedings in the District Court, in which a determination of that cause was had, that the claimants had received a fraudulent preference, and that in consequence thereof they were disabled to prove as creditors against the bankrupts for any part of their debt. The proceeding from which the present appeal is taken, was the ordinary proceeding by a creditor to prove his debt in bankruptcy, and was taken from an order or decision of the District Court against the creditors' claim. But this decision is vacated by the appeal, and goes for nothing against the creditor. The ground of that decision, is, however, not vacated, but may be availed of on this trial in opposition to the creditor's claim in so far as by law it is in its nature available.

Now, a prior adjudication is always available against the defeated party when made in a competent jurisdiction, and upon a controversy actually decided in that adjudication. If in a suit in a Justice's Court the matter had come to be in judgment between these parties, the defeated party would have been bound everywhere, and could never have been permitted to litigate the point anew. The principle is very familiar, and I refer to the case of *White v. Coatsworth* (6 N. Y., 137) only as a striking illustration of its universality.

There a verdict in summary proceedings to recover the possession of demised premises was thus stated by the court, "the judgment of a court of competent jurisdiction upon a point litigated between the parties is conclusive in all subsequent controversies, when the same matter comes again directly in question between the same parties." The question then is, was there such an adjudication applicable to the case now on trial? I think it undeniable that such an adjudication did take place. The parties might probably have insisted that the matters in question could only be judicially determined in a plenary suit; but they did not take this ground, and on the contrary submitted

In re Leland et al.

the whole matter to the decision of the District Court, which, by its decree entered November 1, 1873, adjudged the claims of the new plaintiffs to be affected by the preferential securities therein referred to, and upon that ground debarred them from any participation in the distribution of the fund then being administered. At the hearing of that application the parties now concerned appeared by their counsel, and in open court waived all objection to the form of the proceeding, and submitted all the questions involved therein to the decision and decree of the court. The general question which the court was then dealing with was the distribution of a fund derived from the sale of property which had belonged to the bankrupts; and as a necessary part of the inquiry, the court was compelled to consider whether the securities charged upon that property, and which these creditors had received, were preferential, and so void.

The court adjudged the securities preferential, and declared that the creditors who had taken them, including the plaintiffs in these suits, were parties to the preferential purpose, and decreed them to be debarred from any lien upon the fund in question. This adjudication stands in force at this day, and cannot be deprived of its effect upon the rights of those parties. It cannot come in question in the pending suits.

They do not bring up the merits of that decision for re-examination in any way. The facts established in that litigation bring the cases of these plaintiffs within the scope of the provision of the Bankrupt Law which debars the proof of a debt in respect to which a preference has been received, when the assignee has recovered back the property. Upon this part of the case I refer to and adopt the opinions of Judge Blatchford in respect to the claims of these creditors as pronounced and reported in *Re Leland and others, bankrupts* (9 N. B. R., 209; 7 Ben., 156, 436). The questions involved are there amply discussed, and I see no advantage to the parties or to the law in going over the same ground and reiterating the same views.

Upon all these points the evidence produced by the defend-

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ant is not only admissible, but it seems to me also conclusive against the plaintiffs. Under the arrangement at the trial, I do not now proceed to give judgment in the cases.

COURT OF APPEALS—NEW YORK

SEPTEMBER 19, 1876.

An assignment for the benefit of creditors, without preferences, made in good faith and with no fraudulent intent, is valid.

LEVI HAAS, Assignee, &c., v. THOMAS O'BRIEN.

APPEAL from judgment of the General Term of the Superior Court of the City of New York, affirming a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought by plaintiff, as assignee in bankruptcy of one Flanigan, to set aside a general assignment for the benefit of creditors, made by him within six months prior to the commencement of bankruptcy proceedings, to defendant, and to compel defendant to account for the property received by him under said assignment.

The facts are sufficiently stated in the opinion.

Jacob A. Gross, for the appellant.

Plaintiff having failed to show an appointment, or to either allege or prove any transfer or assignment of the property claimed, was not entitled to the relief prayed for, and should have been nonsuited. (*Hampton v. Rouse*, 11 N. B. R., 472; *Schieffer v. Garret*, 2 Id., 591; *Herndon v. Howard*, 4 Id., 212; 40 How. Pr., 288; Bump on Bankruptcy (8th ed.), 139; Id., Section 5049, and notes, pp. 537, 538; Id., Section 5044, p. 473, and notes; Id. (6th ed.), Section 14; *Wells v. Brander*, 18 Miss., 348; *Cone v. Purcell*, 11 N. B. R., 490; 56 N. Y.,

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649 ; *Sanger v. Upton*, 13 N. B. R., 226 ; 13 Alb. L. J., 81 ; *Sutherland v. Davis*, 10 N. B. R., 424 ; *Rogers v. Stevenson*, 16 Minn., 68 ; *Cook v. Whipple*, 14 Am. R., 206 ; Bump on Bankruptcy (8th ed.), 529, Section 5047, and notes). Plaintiff having admitted that the general assignment was made in good faith, the court erred in holding it *ipso facto* fraudulent and void. (*Mayer v. Hellman*, 13 N. B. R., 440 ; 13 Alb. L. J., 199, 200 ; *Thrasher v. Bentley*, 59 N. Y., 649 ; *Sedgwick v. Place*, 1 N. B. R. (204), 673 ; *Langley v. Perry*, 2 Id. (180), 596 ; *Tiffany v. Lucas*, 8 Id., 49 ; *Cook v. Rogers*, 13 N. B. R., 97 ; 31 Mich., 391 ; *Wilson v. City Bk.*, 9 N. B. R., 97 ; 17 Wal., 473, 484, 485 ; *Browning v. Hart*, 6 Barb., 91, 94 ; *Beck v. Parker*, 3 Am. R. (65 Penn., 262), 265).

The general assignment was not a fraud upon the creditors or the Bankrupt Act. (*Langley v. Perry*, 2 N. B. R. (180), 596 ; *Tiffany v. Lucas*, 15 Wal., 410, 422 ; *Wilson v. Pearson*, 20 Ill., 81, 89 ; *Wadsworth v. Tyler*, 2 N. B. R., 316, 319-321 ; *Browning v. Hart*, 6 Barb., 91, 94 ; *Black & Secor*, 1 N. B. R., 353, 359 ; *Buckingham v. McLean*, 13 How., 151, 167 ; *In re Craft*, 2 N. B. R., 111 ; Bump on Bankruptcy (6th ed.), 588, Section 39, note *g*.) The motion to dismiss for want of jurisdiction should have been granted. (*Gilbert v. Priest*, 8 N. B. R., 159 ; 65 Barb., 444 ; *Bingham v. Claflin*, 7 N. B. R., 412 ; *Voorhees v. Frisbie*, 8 Id., 152 ; *Shaw v. Meldrum*, 14 Abb. Pr. (N. S.) 165, note ; *Newman v. Fisher*, 37 Md., 259 ; *In re Wylie*, 2 N. B. R. (53), 137 ; *Davis v. Anderson*, 6 Id., 146 ; R. S., U. S., 134, 135.

Samuel Hand, for the respondent.

The assignment, having been made within six months before the filing of the petition in bankruptcy, was void. (Bump on Bankruptcy (5th ed.), 467, 510 ; Id., 524-526 ; 2 N. B. R., 129, 131.) The state courts have jurisdiction of actions of this nature. (*Cook v. Whipple*, 9 N. B. R., 455 ; 55 N. Y., 150 ; *Sloan v. Lewis*, 12 N. B. R., 152 ; 21 Wall., 398 ; Alb. L. J., April 24, 1875, p. 266.)

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MILLER, J.—The assignment made by Flanigan to the defendant was in trust to pay all the creditors of the assignor equally and alike without any preference; and it was admitted upon the trial that Flanigan, being insolvent, made and executed the assignment in good faith, and to insure, under and by virtue thereof, the distribution of all his property among his creditors without preference. It was also proved that it was made without any intention to delay, hinder or defraud creditors, or to defeat the object of the Bankrupt Act. The provision with which it is claimed that the assignment was in conflict and which rendered it void, declares that: "If any person, being insolvent or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance, is made with a view to prevent his property from coming to the assignee in bankruptcy, or to prevent the same from being distributed under this Act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt; and if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud." (See Section 35, Bankrupt Law; also the last two clauses, Section 39, Bankrupt Law, before the amendment of June, 1874.) Although the referee found that the assignment was void under the Bankruptcy Act, and that it did tend to evade the provisions of the same, and prevent the assignor's property from being distributed, there is no distinct finding that the assignment was made in direct contravention of the provisions cited; and the fact that it was done in good faith and without any intention to violate or defeat the

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provisions of the Act, as already stated, rebuts any presumption, arising under the Act, that it was *prima facie* fraudulent. The conclusion of the referee referred to, therefore, rests upon the simple fact that the assignment was made within six months prior to the filing of a petition in bankruptcy within the Act, in contemplation of insolvency by the bankrupt, and with the knowledge of the defendant, or reasonable cause to believe, at the time, that Flanigan was insolvent.

The real question to be determined, then, is whether an act of this kind, made in good faith and with no fraudulent intent, for the benefit of creditors, is in violation of the spirit and intention of the Bankruptcy Act, and for that reason fraudulent and void. The provisions cited evidently contemplated not only that the assignor should commit the act when insolvent or in contemplation of insolvency, but that the assignee should have reasonable ground to believe that such was the case, and that the assignment was made with a view of preventing the property from being disposed of under the Bankruptcy Act, and as therein provided.

As there is no finding of fact that the intent was to evade any of the provisions of the Act, and as the proof and admissions show good faith, the conclusion that the assignment was void and did tend to evade the provisions of the Act does not appear to be warranted. The object and purpose of the act in question was to provide a system by which the property of an insolvent could be appropriated and applied to the payment of his debts in equal and just proportions. The theory upon which the Bankrupt Act is based is, that no preferences shall be allowed; that every creditor shall be entitled to his *pro rata* share of the bankrupt's estate, and thus fraud prevented in the distribution of his assets. When, therefore, an assignment is made for the benefit of all the creditors equally in good faith, without fraud or any intent found to contravene any provisions of the law, or to hinder, delay or defraud creditors, it is not apparent how such assignment can be considered as a violation of the spirit and intention of the Act itself.

In *Tiffany v. Lucas* (8 N. B. R., 49; 15 Wall., 410, 422), it was

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held that two things must concur to bring an assignment within the prohibition of the Bankrupt Act, viz., the fraudulent design of the bankrupt, and the knowledge of it on the part of the assignee. Neither of these features characterize the case at bar. The admission and proof establish that there was no such design or knowledge. In fact, that all the parties acted in entire good faith, and with no intent to violate the provisions of the Act.

The principle is settled in this court, that when the debtor has not been proceeded against, or taken any proceedings in the Bankrupt Court, an assignment for the benefit of creditors by such debtor, which gives no preference to any creditor, is not an instrument void *per se*, as in hostility to the Bankrupt Act. (*Thrasher v. Bentley*, 59 N. Y., 649; see also, *Cook v. Rogers*, 13 N. B. R., 97; 31 Mich., 391; *Beck v. Parker*, 65 Penn., 262; *Hawkin's Appeal*, 2 N. B. R., 378, 34 Conn., 548.)

The fact that proceedings were instituted within the six months provided for by the section cited, does not change the application of the rule referred to unless there is a fraudulent design and knowledge.

In *Sedgwick v. Place* (1 N. B. R., 204, 673), it was held in the United States Circuit Court of New York, by Mr. Justice Nelson, that a general assignment untainted with fraud as against creditors or the Bankrupt Act is valid, and the property will not be turned over to the assignee in bankruptcy. An application in this case was made for the benefit of the Bankrupt Act, within six months after the assignment had been made. In *Langley v. Perry* (2 N. B. R., 596), in the United States Circuit Court of Ohio, where the petition was filed against the debtor within the six months, SWAYNE, J., *held*, that such an assignment was not necessarily a conveyance with an intent to hinder, delay, or defraud creditors, and where the intention was to secure an equal distribution of all the debtor's property among all his creditors, it was not a conveyance with an intent to defraud or delay the operation of the Bankrupt Act.

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It was said that the innocence or guilt of the act depends upon the mind of him who did it, and it was not a fraud within the meaning of the Bankrupt Act, unless it was meant to be so.

In *Mayer v. Hellman*, (13 N. B. R., 440; 13 Alb. Law Jour., 200), the general doctrine was upheld, that a general assignment for the benefit of creditors was not fraudulent or absolutely void.

FIELD, J., who delivered the opinion of the court, said there was much force in the position of counsel, that such assignment is only a voluntary execution of what the Bankrupt Court can compel, and as it is not a proceeding in itself fraudulent as to creditors, and does not give preference to one creditor over another, that it conflicts with no positive inhibition of the statute, and that it had the support of the decisions last above cited. He further stated that it was unnecessary to express any decided opinion upon the question, because its decision was not required for the disposition of the case.

Although the point now presented was not distinctly decided in the case last cited, yet that case, in connection with the other cases referred to, tends strongly to sustain the doctrine that a general assignment violates no provision of the Bankrupt Act. (See also, *Smith v. Justiana Ins. Co.*, 4 C. L. N., 130; *In re Marter*, 12 N. B. R., 185; *In re Kintzing*, 3 N. B. R., 217.) There are authorities adverse to the cases cited; most of them are the decisions of the United States District Courts, which are not as authoritative as the cases already cited, and the distinct point now raised was not made, nor does it appear distinctly in any of them, as in the case at bar, that any of the assignments were made in good faith, and with no design to evade the provisions of the Bankrupt Act. (*Foster v. Hackley*, 2 N. B. R., 406; *In re Smith*, 3 Id., 377; *In re Goldschmidt*, 3 Id., 165; *In re Spicer v. Ward*, 3 Id., 512; *In re Randall & Sutherland*, 3 Id., 18; *In re Pierce & Holbrook*, Id., 258; *In re Wells*, 1 Id., 171; *In re Burt*, 1 Dillon, 439; *Hardy v. Bininger*, 4 N. B. R., 262.) In the last case, WOODRUFF, J., makes some remarks in regard to the design of the Bankrupt Act in reference to

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the property of insolvents, and the effect of some of its provisions, which would not apply where property was in the hands of a receiver appointed by a State court; but the point now raised was not presented, and the case is not analogous.

Although some of these cases appear to sanction the doctrine that the Bankrupt Act absorbs and swallows up all other proceedings in the State courts; there are the strongest reasons for holding that the Act was not intended to interfere with the debtor, where, with an honest purpose and entire good faith, he sought to apply his property for the benefit of his creditors precisely in the same manner as was intended, and as would have been done by proceedings under the Bankrupt Act, and probably at less expense, and far more to the advantage of the creditors.

The Act was aimed at fraud, and to prevent preferences; and where neither of these are apparent, there is no ground for claiming that an equitable distribution of the insolvent's estate is in violation of the law. The later cases, to which reference has been had, uphold these views very decidedly, and, I think, should be followed. The court below erred in holding that the assignment was void and tended to evade the provisions of the Bankrupt Act, and for this error, without considering the other questions raised, the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur

Judgment reversed.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Where the assignee chosen had been for several years the bookkeeper of one of the bankrupts, and said bankrupt and his attorney endeavored to control the action of the meeting in electing him, and both voted for him on powers of attorney, confirmation was refused, although the election was almost unanimous, as it appeared that a large number of individual

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creditors of said bankrupt were not and could not, under the law, be represented at such meeting.

The District Judge is bound to see that the rights of the minority are protected, and to refuse confirmation where he has good reason to suspect the assignee has been chosen in the interests of the bankrupts, or if the circumstances are such as to indicate that the election was not a fair one.

In re WETMORE & BRO.

On objections to confirmation of assignee.

On the 25th of August a meeting was held before the Register, at which thirty-five creditors, representing thirty-five thousand nine hundred and fifty-five dollars, voted for Mr. Williams, and three creditors, representing one thousand and forty-four dollars, voted against him. The matter came before the court upon objections filed by these three creditors, certified by the Register with his opinion that the election should be approved by the Judge. The facts are fully stated in the opinion of the court.

George W. Moore, for the objecting creditors.

D. H. Ball and *H. W. Montrose*, for the assignee.

BROWN, J.—While the choice of an assignee is vested by law in a majority in number and amount of the creditors, it is subject, nevertheless, to the approval of the District Judge—a provision which implies a discretionary power to disapprove the choice so made. While the judge ought not arbitrarily, capriciously, or from dislike or partiality, to overrule the decision of the creditors, he is bound to see that the rights of the minority are properly protected, and to refuse confirmation where he has good reason to suspect the assignee has been chosen in the interest of the bankrupts. (*In re Bliss*, 1 N. B. R. 78.) I think he is not bound to find as a fact that the assignee is incompetent, corrupt, or unfit, but may decline to approve if the circumstances are such as to indicate the election was not a fair one, or that the assignee will not truly represent the body of the creditors. (*In re Clairmont*, 1 N. B. R., 276; *Lowell*, 230.) For example, any interference of the Regis-

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ter in the election is wholly unwarrantable and improper. (*In re Smith*, 1 N. B. R., 243.) A creditor who has received an unlawful preference is ineligible by the statute. A near relative of the bankrupt is regarded as objectionable. (*In re Powell*, 2 N. B. R., 45 ; *in re Bogert*, 2 N. B. R., 435.) And the practice of soliciting votes by a candidate who was a stranger to the creditors, and made it a regular business to seek out creditors and persuade them to vote for him, has been held to vitiate an election. (*In re Doe*, 2 N. B. R., 308 ; *In re Mallory*, 4 N. B. R., 153.) And in one case the fact that the assignee was the confidential clerk of the bankrupt's attorney was considered good reason for withholding approval of the choice. (*In re Mallory*, 4 N. B. R., 153.) In cases of common law assignments, wherever like relationships are shown, the parties are held to stricter proof of the fairness of the transaction. "Any relation which gives rise to confidence, though not a badge of fraud, strengthens the presumption that may arise from other circumstances, and serves to elucidate, explain or give color to the transaction." (Bump on Fraudulent Conveyances, p. 96.) Indeed, cases under the Bankrupt Law are numerous where judges have refused to confirm, though no evidence was produced of incapacity or want of integrity.

In the case under consideration, Mr. Williams, the choice of the creditors, had been for several years the bookkeeper of Mr. William L. Wetmore, one of the bankrupts. Mr. Wetmore and his attorney were present at the first meeting of the creditors and procured an adjournment, urging as a reason that many additional claims would be proved. Several of those claims were subsequently proved, and the vote of the creditors, except in three instances, cast for Mr. Williams. Mr. Wetmore and his attorney attended the adjourned meeting, endeavored to control its action, and both voted under powers of attorney received from different creditors, and made an effort to have the bond fixed at five thousand dollars, which, considering the assets are eight hundred thousand dollars, may be regarded as a merely nominal amount. It also appeared that five depositions in proof of debts were made upon blanks obtained by

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Wetmore from the register, all of whom voted for the same candidate ; that one creditor to the amount of over ten thousand dollars, more than one-quarter of the amount represented at the meeting, voted with the majority, and that it had a claim against the bankrupts only as endorser upon paper, the makers of which were responsible ; that an attorney representing one of the larger creditors was a relative by marriage, and had been in the employ of the bankrupt as clerk ; that the son, wife, and brother-in-law of one of the bankrupts also proved debts and voted with the majority ; that the wife of a partner of a bankrupt in another company also proved a large claim and cast her vote in the same direction ; that a short time prior to the institution of proceedings, one of the bankrupts executed to his son and also to his partners deeds of land acknowledged before Mr. Williams as notary public. I am satisfied, too, from the testimony, that one of the bankrupts, prior to the meeting, was actively engaged soliciting votes for his candidate, and made some efforts to secure his election.

While perhaps none of the above facts standing alone would justify a refusal to confirm, taken together they raise in my mind a very grave suspicion that the election was really in the interest of the bankrupts. It is true the majority in number and amount was very large. Out of forty-three creditors, representing thirty-nine thousand three hundred and eighty-eight dollars, thirty-five representing thirty-five thousand nine hundred and fifty-five dollars voted for Mr. Williams, and but three, representing one thousand and forty-four dollars, voted against him. In fact, the election was so nearly unanimous I should feel almost justified in refusing to listen to the protest of the minority, were it not that the individual creditors of William L. Wetmore, aggregating some eight hundred thousand dollars, were not, and under the law could not be, represented at the meeting. (*In re Scheiffer and Garrett*, 2 N. B. R., 591.) They are, however, entitled to the protection of the court, and the very fact of their inability to vote renders it the more necessary that the assignee thus chosen by a small fraction of the creditors should be not only above cavil, but beyond

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suspicion. While there is not the slightest imputation upon the character of the assignee, the evidence that he was elected in the interest of the bankrupt is too strong to justify my approval of the choice.

An order will be entered referring it to the Register to call a new election. The Register is further instructed to receive no votes cast by the bankrupts or their solicitors of record under powers of attorney from other creditors, and to fix the bond at not less than fifty thousand dollars. There is also a discretion in the Register to postpone the proof of debts about which there is any doubt until after the election of an assignee, and I think this discretion should be exercised where claims are presented by the wife or son of the bankrupt, unless it be made entirely clear that they are just debts against the estate. (*In re Northern Iron Co.*, 14 N. B. R., 356; *In re Jackson, Id.*, 449.)

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

A general unsecured creditor is entitled to intervene and contest a petition in involuntary proceedings.

In re AUSTIN, TOMLINSON & WEBSTER.

ON petition of the People's National Bank of Jackson for leave to intervene and contest a creditor's petition for adjudication.

After alleging that petitioner was a general creditor of the bankrupt to the amount of four thousand dollars, the petition set forth upon information that the proceedings were carried on by collusion between the petitioning creditors and the bankrupts; that one of the bankrupts had made to a petitioning creditor two mortgages, to secure the payment of notes upon which the bankrupts were liable to the amount of thirty thousand dollars, which transaction was alleged to be a preference; and that efforts had been made by certain of the creditors of the bankrupts to induce the petitioner to join in the

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creditors' petition, stating that they were the only creditors in Jackson who had not been "taken care of."

It further alleged that the firm had not been partners in trade, as charged in the petition, or carried on the business of traders within this district since 1873, and had not fraudulently stopped payment, as was charged in the petition, nor committed any of the other acts of bankruptcy set forth therein; and further charged that the court had no jurisdiction, by reason of any of the allegations in the petition, to adjudge them bankrupts; it further set forth, that the institution of bankrupt proceedings was opposed to the interests of the petitioner, and if not impeded by such proceedings, petitioner would be able to collect its claim in the courts of this State; that it was informed, and believed, that said Webster had unencumbered real estate liable to levy and sale upon execution. The petition closed with the prayer for liberty to intervene and oppose the adjudication.

Mr. Wilson, for the intervening creditor.

Mr. Peck, contra.

BROWN, J.—It is now well settled that any creditor, whose interests are affected by an adjudication, has a right to intervene and contest all the allegations of the creditors' petition. The difficulty is to determine when the interests of the creditor are likely to be jeopardized by the proceeding. In every case in which leave to intervene has been granted, the creditor had an interest peculiar to himself, either by way of attachment, preference, or the institution of proceedings by him in another district. (*In re Boston, Hartford & Erie R. R. Co.*, 6 N. B. R., 209; 9 Blatch., 101; *In re Derby*, 8 N. B. R., 106; *In re Mendelsohn*, 12 Id., 533; *In re Bergeron*, 12 Id., 385; *In re Hatje*, 12 Id., 548; *In re Jack*, 13 Id., 296; *In re Williams*, 14 Id., 132; *In re Stafford*, 13 Id., 379.)

It has not yet been decided that a general unsecured creditor is entitled to be heard, but I think it follows logically from the reasoning in the cases above cited.

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He certainly has an interest in knowing whether the proper number and amount of creditors have joined in the petition, for if the debtor voluntarily becomes bankrupt, he could not obtain his discharge without the assent of one-quarter in number and one-third in value of his creditors. Precisely the same proportion being necessary to put a debtor into bankruptcy, the inference naturally follows that the petitioning creditors are regarded by the act as assenting to the discharge, in like manner as if they had expressly signified their assent in a voluntary case, provided the bankrupt has been guilty of no fraud or misconduct. (*In re Scull*, 10 N. B. R., 165; *In re Wilson*, 13 Id., 253; *In re Duncan*, 14 Id., 18.) It thus becomes a matter of considerable importance to every creditor that the requisite number does in fact join. To this extent, also, the act itself seems to contemplate their being heard, by providing that if the allegation as to number and amount be denied, the court shall ascertain, "upon reasonable notice to the creditors," whether one-fourth in number and one-third in amount have petitioned that the debtor be adjudged bankrupt. If then they are entitled to notice, and may be heard upon a denial filed by a debtor, I see no reason why they may not intervene and be heard in their own behalf, even if the debtor interposes no objection. (*Clinton v. Mayo*, 12 N. B. R., 39.)

Though a general creditor may derive no special advantage to himself from defeating an adjudication upon the merits, as all will share alike in the general distribution of the assets, I think he has a substantial interest in the liberty of pursuing his common law remedy for the collection of his debt, which he loses by an adjudication. From the language of the petition in this case, "if not impeded by such proceedings, your petitioner will be able to collect its said claim in the courts of this State," I judge this to be the object of this proceeding. It is true the petitioner may thereby gain a preference over other creditors; but the bankrupt law does not frown upon preferences lawfully obtained, or interpose any obstacle in the way of a diligent creditor. If the court may lend its aid to protect liens already acquired, which would be held unlawful preferences if bank-

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ruptcy proceedings were successful (and it is upon this theory the above cases are decided), it is not easy to see why it should refuse to listen to a creditor who may anticipate hereafter the acquisition of such liens. The desire of a creditor to pursue his lawful remedy in the State court cannot be made the subject of censure or criticism here. Indeed, his right to do this is a substantial interest for which he may fairly claim protection. It is only when the connivance of a debtor contributes to a preference gained by legal proceedings that the law pronounces it a fraud.

While, as before observed, the view here taken finds no positive support in the authorities, there is no reported case holding that a general creditor may not be heard. In more than one the intimation is in this direction. Speaking of a creditor's petition, the late Judge Woodruff, whose eminent legal abilities entitle even his dicta to respectful consideration, observed (6 N. B. R., 213), "it is not a mere suit *inter-partes*, it rather partakes of the nature of a proceeding *in rem*, in which every actual creditor has a direct interest." In *Re Walker* (1 N. B. R., 386), Judge Lowell entertained a petition by an unsecured creditor, to vacate an adjudication for want of jurisdiction, although no objection seems to have been taken to the creditor's right to be heard. In *Re Fogerty and Gerity* (4 N. B. R., 451), the learned Judge for the District of California remarks: "But all other creditors are parties to and bound by the proceeding. If it be sustained, the ordinary remedies against the debtor will be suspended, the whole of his property will pass into the hands of an assignee, and they will be obliged to come into court to prove their debts, enforce their lien, adjust their accounts, and receive dividends, and the unsatisfied claims may be forever barred by the discharge of the bankrupt. They have, therefore, a clear right to be heard, and to resist the proceeding, on the ground that the court is without jurisdiction." Though the creditor in this case had a lien by attachment, the decision does not seem to have been placed on this ground. (See also *In re Mendlesohn*, 12 N. B. R., 584.)

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Though the question is not free from doubt, I think a general creditor may make himself a party to this petition, and the prayer of the petitioner is therefore granted.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

DECEMBER 17, 1877.

The Bankruptcy Court has full equitable powers over a proceeding in bankruptcy, and where it clearly appears to have been instituted for purposes foreign to the legitimate object of the act, it will be summarily dismissed. A partner will not be allowed to put his firm, whose affairs were settled years ago, into bankruptcy, on an allegation that it is insolvent by reason of petitioner's own fraud in effecting a composition with its creditors. Where it appears that a petitioning partner has obtained, without consideration, assignments to his father of a large number of the pretended claims against his firm, *held*, that this conduct, under the circumstances of the case, is a fraud on the Bankrupt Law.

In re HAMLIN, HALE & CO.

PETITION by Hamlin for adjudication of the firm of Hamlin, Hale & Co., composed of petitioner and R. W. Hale, filed April 18, 1877.

Answer of Hale to rule to show cause, filed June 21, 1877, contains general denial, and a special motion, upon affidavits filed, to dismiss proceeding as to said firm because it is instituted not in good faith for the benefit of creditors, or to obtain a discharge, but for private and malicious purposes of petitioner.

Affidavit of Hale states that his said firm has not existed since 1871, and all of its debts were paid about five years before this petition was filed, under a composition deed at fifty cents on the dollar, executed by all the creditors November 1, 1871, which composition was effected by Hamlin personally, and was obtained and carried out in good faith, unless Hamlin himself committed some fraud respecting it hitherto kept secret from all concerned.

That the debts of Hamlin, Hale & Co., scheduled by peti-

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tioner, are solely the fifty per cent. thrown off in the aforesaid composition, which settlement Hamlin now seeks to nullify in order to make out his old firm to be insolvent.

That Hamlin, before filing this petition, threatened H. B. Claflin & Co., of New York, that if they did not loan him fifteen thousand dollars he would break up said composition, and cause them to be sued for a pretended illegal preference obtained by them under it from Hamlin, Hale & Co.

That Hamlin then went to said creditors, and by misrepresentations that he merely desired to remedy, for the benefit of his firm, a technical defect in said composition, obtained the signatures of most of them to an assignment to his, Hamlin's, father, of any claim they might have against Hamlin, Hale & Co.

That Hamlin thereupon filed this petition, setting forth as creditors of his said firm the said former creditors (without mentioning the composition or the assignments to his father), and setting forth as assets certain unsettled claims against insurance companies and claims for goods sold, and *a claim against H. B. Claflin & Co. for an undetermined amount.*

That all the firm assets had in fact been assigned by Hamlin to Hale, and a full settlement made between said partners, and Hale had sold all said assets some two years ago.

That there was no valid claim against H. B. Claflin & Co., and the last-mentioned firm had in fact lost by Hamlin, Hale & Co. a larger percentage than any other creditor.

Respondent, Hale, also filed the affidavit of W. S. Dunn, a member of the firm of H. B. Claflin & Co., corroborating Hale's statements, and the affidavits of twenty-two creditors corroborating his statement as to the misrepresentations by which Hamlin obtained the assignments to his father.

In reply to Hale, the petitioner filed his affidavit, setting forth that he, Hamlin, did effect the composition, but at the direction of H. B. Claflin & Co. he misrepresented the assets and liabilities of his firm, and its liabilities to Claflin & Co., with the object of saving a large amount and paying it as a preference to said last-named firm, and that said amount was

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paid in fraud of the rights of the other creditors under the composition, and that Hale was privy thereto.

That it was true he had obtained an assignment to his father of said claims by such creditors as would execute it, and his father had, a month after the petition was filed, assigned said claims to a trustee to pay the individual debts of petitioner.

Petitioner denied having applied to H. B. Claflin & Co. for money, or having made any threats, but he did not deny the allegations as to the means by which he obtained the assignments to his father.

It further appeared that, upon the dissolution of the firm sought to be adjudicated herein, a new firm of the same name, but with two new members, had been formed, and continued until November, 1873, when all the partners except Hamlin retired, and Hamlin organized the firm of Hamlin, Davey & Co., which continued several months longer, and that during all this time no objection had ever been made by Hamlin or any one else to the validity of said composition until the filing of this petition.

It further appeared, by affidavits and papers filed, that since this petition was filed nearly all the alleged creditors had signed a paper ratifying and confirming said composition, notwithstanding the charges of Hamlin.

A. S. Bradley and H. H. Thomas, for respondent Hale.

This court, sitting in bankruptcy, has full equitable powers over a case—the same as have been exercised in the English courts—derived by construction from the Acts of Congress. (R. S., Sections 563, 711, 4972; *Re Robert Morris Crabbe*, Rep., 70; *Ex parte Christy*, 3 How., 292.)

The proceedings in the bankruptcy case proper are in equity, although, by special provision of Section 566, a particular issue tried by jury is substantially a common law proceeding. (Bump on Bankruptcy, Section 4972; *Re Schuyler*, 2 N. B. R., 549; *Re Wallace*, 2 N. B. R., 134.)

If it clearly appears that a proceeding in bankruptcy was

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instituted for purposes, or mainly for purposes, foreign to the legitimate object of the Bankrupt Law, the court will supersede it. (*Amsinck v. Bean*, 11 N. B. R., 495; 22 Wall, 395; Robson on Bankruptcy, p. 610, and cases cited; *Re Bourne*, 2 Glyn. & J., 137; *Ex parte Harcourt*, 2 Rose, 208; *Ex parte Phipps*, 3 M. D. & DeG., 505; *Re Davies*, L. R., 3 Ch. Div., 461.)

The interference by several State courts, enjoining the prosecution of proceedings in bankruptcy for inequitable purposes, shows that the necessity of enforcing the above doctrine exists in this country.

In the English cases cited above, the moving parties appeared in a less inequitable position than Hamlin, for they were merely seeking ends which might have been legitimately prosecuted by other means, while this petitioner admits that the whole foundation of his proceeding is his own fraud, and that he has obtained control of the fund sought to be recovered, and he does not deny the charge that he also obtained this control by fraud.

Messrs. *Swett, Hervey & Bisbee*, for petitioner, argued that the proceeding was one of strict right, in which creditors had an interest, and that this court has not the discretionary power exercised in England.

Wirt Dexter, for respondent.

1. The original composition deed, being under seal, and not impeached by creditors, Hale is entitled to the benefit of it, and it cannot be collaterally attacked by Hamlin by reason of his own fraud in effecting it. The composition has already been twice ratified by the creditors, who alone could impeach it.

2. Hamlin got control of the assets as a trustee for his firm, and it would be a fraud on his firm, or the firm creditors, to cause the assets to be assigned for the benefit of his individual creditors.

3. Even if the individual creditors obtained title to a claim

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process and proceedings of this court, and making gain for Hamlin.

That a court, when it is satisfied its process is being abused and used for sinister, oppressive, and vexatious purposes, has power to dismiss the proceeding, is fully sustained by the following authorities: (*Amsinck v. Bean*, 11 N. B. R., 495; 22 Wall, 395.) So in *Re Robert Morris* (Crabbe Rep., 70), Hopkinson, J., says: "The judge to whom the power is given to issue a commission has also the power to recall it, if, instead of answering the purposes for which it is issued, it is used as an instrument of fraud and oppression."

In *Eckfort v. Greeley* (6 N. B. R., 433), Judge Krekel says that when bad faith appears to be actuating petitioners, "the court will not be slow in ordering them not to come here without clean hands."

The same rule was applied in this court in *Re Scammon* (11 N. B. R., 280), where this court dismissed the petitioner summarily, on motion, on the ground that the petition had not been filed in good faith. The District Courts, sitting as Courts of Bankruptcy, are clothed with all the powers of Courts of Equity to accomplish the purposes essential to the full operation of the system. (*In re Christy*, 3 How., 292.)

So, too, the English Chancellors have never hesitated to dismiss cases when satisfied they were brought with the intent to abuse the process of the court, or with the purpose of oppressing and vexing the respondents. (See Robson on Bankruptcy, p. 610; *Bourne's Case*, 2 Glyn & J., 137; *Harcourt's Case*, 2 Rose, 203; *Gallimore's Case*, *Ibid.*, 424; *Phipp's Case*, 3 M. D. & DeGex, 505; *Ashworth's Case*, L. R., 18 Eq. Cas., 705; *Davies' Case*, L. R., 3 Ch. D., 461.)

It seems to me that, upon the admitted facts in this case, the rule against Hale should be discharged.

It cannot be said that this firm owes legal debts at this time; for, admitting the frauds upon the creditors alleged by Mr. Hamlin, still no one but the wronged creditors themselves could take advantage of those frauds.

It strikes me that a fair way to test this proposition would

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be to ask if Mr. Hamlin, by going to one of these creditors and voluntarily paying him the fifty per cent. on the old debt which was thrown off in the composition of 1871, could maintain a suit at law, or in any other form of action, against Hale for contribution. If he could not do that, he certainly cannot revive the old debt as against the firm and force the firm into bankruptcy.

I therefore think this court justified in finding that this proceeding is not prosecuted in good faith; that it is an attempt to abuse the process of this court, which should not be sanctioned or tolerated.

It might also be asked what is to be gained, so far as the alleged Claflin preference is concerned, by putting this firm into bankruptcy? This preference, if taken at all, was taken five and a half years before the petition in this case was filed. It is not denied but that Hamlin, Hale & Co. owed Claflin & Co. all the money paid them, but it is claimed that they were paid more than the other creditors. This would make the settlement voidable at common law as between the debtors and creditors; but the only right of action which could be maintained in behalf of creditors would be, under the Bankruptcy Law, if an adjudication had been had against the firm of Hamlin, Hale & Co. within six months after the preference was taken.

Upon the argument of the case it was urged that the limitation did not apply nor begin to run until the preference was discovered, but from a number of cases I have examined I am of opinion that this rule of the Illinois Statute of Limitations does not apply to proceedings under the Bankruptcy Law, and that creditors are obliged to be vigilant in ascertaining whether other creditors have been given a preference or not, and if they do not ascertain that fact within the limited time fixed by the Bankrupt Law, the preference will stand.

The rule is therefore discharged.

In re Ferguson.

UNITED STATES CIRCUIT COURT—E. D. VIRGINIA.

MARCH 30, 1875.

The Bankrupt Court has no jurisdiction to relieve against a judgment obtained against a bankrupt in a suit brought against him after his adjudication, in which for any cause he has failed to plead his discharge. Even if the court had such jurisdiction, it would not interfere to relieve the bankrupt against the *laches* of his counsel and himself.

In re JOHN A. FERGUSON.

HUGHES, J.—John A. Ferguson filed his petition here on the 27th October, 1874, setting forth that he had received a discharge from his debts as a bankrupt on the 25th day of March, 1870; that after the issuing of said discharge a suit was brought against him, upon a debt contracted before his adjudication, in the Circuit Court of the County of Pittsylvania; that after being sued he placed his certificate of discharge in the hands of the attorney employed by him, to wit, R. H. Tredway, to be used in his defence; that the discharge was not filed (pleaded) by reason of the neglect of his said counsel, and judgment was in consequence obtained against him at the May term of the said Circuit Court in 1874; that execution was issued thereon; that an injunction was applied for and obtained from the said Circuit Court, to stay proceedings; that with his bill praying for said injunction his discharge was filed as an exhibit; that the judge of the said Circuit Court of Pittsylvania, at the succeeding term of said court, dissolved the said injunction; and that execution again issued and was in the hands of the sheriff of Pittsylvania at the filing of this petition.

On the filing of the petition here, this, the Court of Bankruptcy which granted the discharge, granted a restraining order against all proceedings by the said sheriff until the further order of court; and a rule was given against the plaintiff in the said suit in the Circuit Court of Pittsylvania and the said sheriff, to show cause why the injunction should not be

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made perpetual. The parties are now before this court on the rule awarded as aforesaid, and on the answer of the said sheriff, who, as administrator, was also the plaintiff in the suit on which the executions issued. I should not have granted the restraining order upon the Pittsylvania sheriff, but for the frequency with which this question of the bankrupt's liability when he fails to plead his discharge, arises.

The only question presented is, whether this court has jurisdiction to relieve against a judgment obtained against a bankrupt in a suit brought against him after his adjudication, in which, for any cause, he has failed to plead his discharge. Clearly it has not. The discharge in bankruptcy must be pleaded in suits upon debts existing before the bankruptcy, just as payment, or the statute of limitations, should be pleaded in proceedings where those pleas constitute the proper defences. If the bankrupt fails, from any cause, to interpose the discharge in bankruptcy, in the suit against him in the State court, this court will not relieve against the consequences of his own neglect. His proper recourse is in the court of law in which the suit was pending; or else by appeal from that court to one having appellate jurisdiction over it, which, in the present case, this court of course has not, or else by a bill of injunction in a State Court of Chancery.

There is but one view of the matter in which this court could consider the question of relief against such a judgment as that complained of. By virtue of the District Court of the United States, as a court of equity, having jurisdiction of matters connected with and growing out of bankruptcy proceedings, it might exercise the same jurisdiction to relieve from a judgment at law in a matter connected with bankruptcy which a State Court of Equity would have if the matter were not connected with bankruptcy.

Although not required in the present case to pass upon that question of jurisdiction, which is a very important one, I will assume, for the sake of argument, that this court would enjoin against the judgment at law complained of, if the facts of this case were such as to warrant it in doing so. In determining

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whether they are of that character my safest and most proper guide are the decisions of the court of highest resort of this commonwealth. The rulings of that court are so strongly against the exercise of such a jurisdiction, that I should feel bound to refuse to interfere if I were passing upon a bill of injunction brought on the chancery side of this court, rather than a petition in bankruptcy on its bankruptcy side.

The following are extracts from some of the decisions of the Virginia Court of Appeals on this subject. In *Tapp's Administrator v. Rankin*, (9 Leigh, 478), that court said: "Although it may be manifest that great injustice has been done a defendant at law by the verdict and judgment against him, yet if this injustice had not been produced by any fraud, or surprise on the part of the plaintiff, but is the result either of the defendant's own negligence or of his *counsel's ignorance or bad management*, a court of equity can give him no relief."

In *Meem v. Rucker* (10 Grat., 506), that court decided that an injunction to a judgment at law will not be sustained where the defendant at law has failed to make his defense at law, from ignorance of the nature of the proceedings against him, and a mistaken apprehension of the steps it was necessary to take in his defence, remarking: "Now, that a party to whom a day and an opportunity have been allowed to make his defence against a demand set up against him in a court of law, but who has wholly failed to avail himself of them, will not be entertained in a Court of Chancery on a bill seeking relief against the judgment which has been rendered against him in consequence of his default, upon grounds which might have been successfully taken in the court of law, unless some reason founded on fraud, accident, surprise, or some other adventitious circumstance beyond the control of the party, be shown why the defence was not made in that court, is a proposition which has been so repeatedly affirmed that it has become a principle and maxim of equity as well settled as any other whatever. It has been recognized and acted upon in very numerous cases in this court as well of ancient as of recent date. The rule has its foundation in wisdom and sound policy. It springs out of the future ne-

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cessity for prescribing some period at which litigation must cease; and I am utterly unable to appreciate the force or justice of the complaints, which, in view of its supposed harsh operation in particular cases, have sometimes been made against it. I think that private right and public interest alike require that it should be adhered to. So numerous, indeed, and so familiar are the cases in which this court has recognized the doctrine, that I deem it entirely unnecessary to cite them here."

In another case that court said: "A defendant upon whom process has been served, who wholly neglects his defence, or contents himself with employing a lawyer who practises in the court to defend him, without giving him any information about his defence, or inquiring whether he is attending to the case, is not entitled to relief on the ground of surprise, however grossly unjust the decree may appear to be." (*Hill et al. v. Bowyer et al.*, 18 Grat., 364-386).

In another case, however, that court decided that where a defendant at law has been *prevented from making his defence by the assurances or promise of the counsel for the plaintiff*, equity will relieve him. (22 Grat., 136). For the grounds on which equity will or will not relieve against judgment at law, see *Holland and Wife v. Trotter*, 22 Gratt., 136.

In *Wallace v. Richmond, Assignee*, decided by the Court of Appeals of Virginia, as late as the 25th March, 1875 (26 Gratt., 67), which was on a bill in chancery to enjoin a judgment at law, that court again said: "It is true that after the writ was served on him he retained counsel to defend the suit, and informed him of the grounds of his defence: to wit, that he was sued as a partner of Black & Co., and was not and never was a partner or member of said firm, in any way liable for said debt. But he gave no further attention to the suit. It does not appear that he even spoke to his counsel on the subject, or made any preparation for his defence, though he was probably at the place where the court was held during the term.

His counsel entered no plea to set aside the office judgment, and made no defence whatever, and judgment went against him by default.

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His counsel says he examined the docket, and saw no case upon it of *Richmond, assignee, v. Wallace*. He saw the case of Richmond, assignee, against Black & Co., but it never occurred to him that the appellant was sued in that case, and he did not look into the papers to see. Yet he had been informed by the appellant that he was sued as a member of that firm, and that his ground of defence was that he was not and never had been a member of it; and he thinks he showed him a copy of the summons which had been served on him. His counsel says he did not remember to have been shown a copy of the summons, and was not aware that the appellee was interested in that suit, else he would have looked into the papers and entered a plea. But a plea denying the partnership could not have availed for his defence unless verified by affidavit; but the defendant was not there to make affidavit to it. It seems to the court a plain case of negligence on the part of the appellant's attorney, not unmixed with fault or negligence on his part. And without deciding that mere inadvertence or forgetfulness on the part of the attorney would deprive a party of his right to relief in equity, where the defendant himself had used proper diligence and was chargeable with no *laches*, the court is of opinion that a court of equity could not interfere by injunction in this case to restrain the execution of the judgment, and to give the appellant another trial, who has already had his day in court, without overturning the well established rule in such cases."

Such are the decisions of the court of the highest resort in this State on the question of opening judgments obtained through the negligence of defendants or their attorneys. Even, therefore, if the court of bankruptcy had the right of a court of equity in such a case as that of this bankrupt, it would not interfere to relieve him against the *laches* of his counsel and himself.

In re Mitchell. Ex parte Sherwin.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

JANUARY 5, 1878.

The funds in the hands of the assignee may be taxed by the State.

In re MITCHELL. Ex parte SHERWIN.

THE city of Boston assessed a tax of one thousand five hundred and fifty three dollars and twenty one cents upon the assignees of Mitchell, Green & Stevens, for the personal estate of the bankrupts in their possession, or under their control, on the 1st of May, 1876, the beginning of the fiscal year. The assignees denied the right of the city to assess them, and the case was submitted to the court upon agreed facts, under a petition by the collector of the city to order the assignees to draw their warrant for the amount of the tax. The assignees had made return of the property to the assessors under protest, so that there was no dispute about the quality or amount. It consisted in part of money, and, in a larger part, of a stock of goods. The stock was sold by the assignees on the 3d of May, in pursuance of an arrangement made before the first day of the month, and the proceeds were divided among the creditors at once, long before the assessment was actually made, or notice given that it would be made; but there was enough money of the estate remaining to pay the tax, if it is properly and legally assessed upon them.

E. P. Nettleton, for the petitioner.

J. Wilder May, for the assignees.

LOWELL, J.—The first ground taken by the assignees is, that they are officers of the court; that the funds in their hands are in the custody of the law, and, therefore, not to be disturbed or interfered with by any action on behalf of the State. An able opinion to this purport has been given by one of the registers. (*In re Booth*, 14 N. B. R., 232.) I cannot subscribe to that

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opinion. I can see no interference or obstruction of the court, or of the law in taxing, to the owner thereof, any fund that may happen to be in whole or partly in the registry of the court, or under its direction, as was the case with the money here, provided there is no attempt to affix upon it a lien, or in some way to disturb the actual custody of the fund. Such an assessment is merely an official declaration that the owner of the fund should pay his share of the public burdens. I do not know why a ship in the hands of the marshal should escape taxation to the owner, though, undoubtedly, it will be free from levy or seizure as long as it remains in his official possession. If the State undertook to tax an assignee in bankruptcy as such, that is, to tax his office and franchise, his right to exercise a function under the laws of the United States, or in any mode to discriminate against an assignee, or against the estate of a bankrupt, very different considerations might arise.

It is said the assignee is an officer of the court; and so he is, in a certain sense, and so is every attorney who practices in the court; and this will protect them from taxation as such officers, but not necessarily in respect to funds which they are to administer for private persons, though their administration should be under the control of the court. The law of Massachusetts for levying taxes does not undertake to act upon personal property *in rem*, but merely upon the owner. An assignee is an officer of court, and much more, as I shall have occasion to show.

2. I have examined with great care the law of taxation. (Gen. Stats., Chap. 2, *passim*.) I should be glad to find there an exemption of assignees who had so promptly and faithfully executed their trust that, while they were appointed in April, they had realized and distributed a great part of the assets long before any assessment was actually made upon them; but I have searched in vain. Section 2 provides that all property, real and personal, of the inhabitants of the State, shall be taxed unless expressly exempted. Section 5 provides what property shall be exempted, and does not mention bankrupts or insolvents, or their estates or assignees.

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Section 10 provides that all personal estate shall be assessed to the owner in the city or town of which he shall be an inhabitant on the first day of May, with numerous exceptions as to the place, and some as to the person—such as that, under some circumstances, the legal owners shall be assessed, and, under others, the equitable owner—but none which makes any exemptions not included in Section 5, and none which affect this case in any direct way, though the section clearly shows that all trustees are intended to be included in the word “owner,” unless otherwise provided for.

The remaining question is, whether the assignees were the owners of this property. This closely resembles the question already answered, and the remarks I am about to make are to be taken as applicable to both points. If assignees are mere agents of the court, and the fund is one in court, there might be reason to say that it was without a definite owner who could be ascertained and assessed, but there is no doubt that assignees are trustees, with great powers and large discretion. They have the legal title and control of the property as fully as the bankrupt had, and it has been repeatedly decided that statutes, or rules having the binding power of statutes, which regulate the administration of their trust, such, for example, as require them not to sell by private contract, or not to bring action or suit without an order of court or a consent of creditors, are merely directory, so that a neglect of them will form no valid objection to a title and no defense to an action or suit. I am of opinion, therefore, that the assignees were the owners of this property on the 1st of May, and that the assessment was properly made before then, and that they should pay the tax.

Order accordingly.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1877.

An assignee of a corporation, appointed under the Bankrupt Laws of the United States, represents both the corporation and its creditors, and the defense of irregular organization cannot be urged against him.

Chubb v. Upton, Assignee, etc.

An Illinois corporation filed papers for the purpose of reorganizing, with an increased capital, in accordance with a statute of that State, which were approved by the attorney-general. Defendant subscribed for the increased capital stock and acted as an officer of the corporation. *Held*, That in an action brought by the assignee of the corporation to enforce such subscription, defendant could not deny the regularity of the organization of the new company.

CHUBB v. UPTON, Assignee of the Great Western Insurance Co.

In error to the Circuit Court of the United States for the Western District of Michigan.

The action was brought by Clark W. Upton, assignee of the Great Western Insurance Company, a bankrupt, against A. Lamont Chubb, to enforce a contract of subscription for stock of the bankrupt. Sufficient facts appear in the opinion.

HUNT, J.—The numerous questions raised upon the trial of this action depend upon a few general principles which are not difficult of application.

It is settled by the decisions of the courts of the United States, and by the decision of many of the State courts, that one who contracts with an acting corporation cannot defend himself against a claim on such contract, in a suit by the corporation, by alleging the irregularity of its organization. This was settled more than half a century since in the courts of the State of New York, and has recently been affirmed in this court. (*Dutchess Cotton Manufactory v. Davis*, 14 Johns., 238; *Sanger v. Upton*, 13 N. B. R., 226; 91 U. S., 56; *Upton v. Trebilcock*, 13 N. B. R., 171; 91 U. S., 45; *B. & A. R.R. Co. v. Cary*, 26 N. Y., 75; *Bissell v. M. S. & N. I. R.R. Co.*, 22 id., 258.)

It is also settled that the same principle applies to the case of a subscription to the capital stock in an organization which has attempted irregularly to create itself into a corporation and has acted as such. (Same auth; *Meth. Ch. v. Picket*, 19 N. Y., 482; *Upton v. Hansbrough*, 10 N. B. R., 369; 3 Bissell, 417.)

The rule applies to increasing the stock of a corporation when the question arises upon paying a subscription for stock

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forming a part of such increase. The duty and the necessity of performing the contract of subscription are the same as in the case of an original stockholder.

An assignee appointed under the Bankrupt Laws of the United States represents both the corporation and its creditors, and the defense of irregular organization cannot be urged against him. (Anth. *supra*.)

It has been several times adjudged in this court that in an action by such assignee to recover unpaid subscriptions upon stock in such an organization, the defense of false and fraudulent representations inducing such subscription cannot be set up, especially when the subscriber has not been vigilant in discovering such fraud and in repudiating his contract. (*Upton v. Trebilcock*, 13 N. B. R., 171; 91 U. S., 45; *Webster v. Upton*, id., 65; *Carver v. Upton*, id., 64; *Ogilvie v. Knox Ins. Co.*, 22 How., 380.)

The same authorities hold that one who receives a certificate of stock for a certain number of shares, at a given sum per share, thereby becomes liable to pay the amount thereof when called upon by the corporation or its assignee. Nor is it necessary to sustain the action that there should have been a subscription for the whole amount named on the articles. (*R. & W. Plank R. Co. v. Wetzel*, 21 Barb., 56.)

The statute of Illinois of 1869 authorized an increase of the capital of the Great Western Insurance Company. Papers were filed under the law for that purpose, which were examined by the attorney-general and certified to be in due form, and the company proceeded to issue its stock upon that theory.

The defendant became a subscriber for fifty shares of this increased stock, the shares being one hundred dollars each. He paid a portion, to wit, thirty per cent. of this subscription. He attended meetings of the stockholders and of the directors, acting himself as such. He gave a proxy to Mr. Atwater to attend a meeting of the stockholders at Chicago and to vote for him, and he was elected and acted as the president of a branch of the said company.

It is idle to deny that this was the case of an organization

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which claimed to have taken and apparently supposed that it had taken the measures required by law to complete its increase of capital. It acted as such, and the defendant, by receiving his certificate of stock, entered into engagements with it as such. If it be conceded that its increased stock was but *de facto*, and that it could have been annulled or suppressed by the action of the attorney-general as acting under an irregular organization, the defendant derives no aid from the admission. The cases cited are clear to the point that he cannot make the objection but must perform the engagements he has made.

The last offer of the defendant was intended to present this question in its most formidable shape. It was to show that the original capital of one hundred thousand dollars was fully subscribed; that the holders of the stock never increased the capital nor authorized its increase; that this company ceased to do business prior to 1868; that the one hundred thousand dollars was not transferred to the company claiming to have organized on the increased capital, and that there was no valid transfer of the original stock or charter.

All this does not alter the fact that there was an attempted alteration of the company under the forms of law, approved by the attorney-general, with an increased capital, in the organization and management of which the defendant took part; that he paid his money, received his certificate of stock, attended meetings, voted, acted as an officer, and, so far as the record shows, never repudiated his position at any time, even to the time of the trial. If successful, he would have shared in its profits. He may have been the dupe and victim of the action of others. He may have been an accomplice. At all events he was so far an actor in the affair that he cannot escape the consequences of his position.

Another series of objections is to the admission of various pieces of evidence introduced to show that the defendant was a stockholder. The original stock-ledger had been destroyed by fire, and the plaintiff supplied its place by the introduction of sundry other kinds of evidence tending to prove who were the stockholders, and that the defendant was one of them. The

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importance of this evidence was at an end when the certificate of shares was afterward given in proof and when it was expressly admitted by the defendant that he held the same; that he made payments thereon and acted as a holder of shares in the company. It is not necessary, therefore, to inquire whether or not the evidence was properly admitted.

At the time this writ of error was taken, the decisions of this court in the several cases of *Upton v. Trebilcock*, *Sanger v. Upton*, and *Carver v. Upton* (*supra*), had not been made. They contain a clear statement of the views of the court upon all of the material points here to be considered, and we suppose that this writ of error would not have been brought had they then been before the party and his counsel. The careful examination given in those cases to the several questions here involved render unnecessary a detailed review of the cases.

We think there is nothing in the record before us that would justify us in disturbing the verdict and judgment rendered in the Circuit Court. The judgment is, therefore, affirmed.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

DECEMBER 14, 1877.

A receiver of an insurance company, appointed under the State laws, has a standing in court to move to set aside an adjudication of the company made upon petition of a trustee in the name of the corporation.

Upon such motion the question whether or not the corporation is insolvent cannot be examined.

Where, by the charter of the company, policy-holders are entitled to vote for trustees and to share in the profits, such policy-holders are corporators within the meaning of Section 122, Chapter 6, title 61 of the Revised Statutes, and have a right to be heard before an adjudication against the company can be obtained.

In re ATLANTIC MUTUAL LIFE INSURANCE CO.

MOTION to set aside an adjudication in bankruptcy.

Henry Smith, N. C. Moak, and Wm. C. Ruger, for the motion.

In re Atlantic Mutual Life Insurance Company.

Amasa J. Parker, Geo. L. Stedman, and D. J. Norton,
opposed.

WALLACE, J.—Upon the application of the Attorney-General of this State, after the opposition on behalf of the Atlantic Mutual Life Insurance Company, that corporation was restrained from the further prosecution of its business by a decree of the court having jurisdiction in the premises, and a receiver was appointed by such decree, who has filed his bond, taken possession of the assets of the company and continues in the discharge of his trust. The proceeding was conducted conformably to Chapter 902 of the Laws of 1869.

Subsequently a petition in bankruptcy was filed in this court, in the name of the corporation, by a trustee thereof, upon which the corporation was adjudicated a bankrupt. The receiver now moves to set aside such adjudication, alleging that the proceedings in bankruptcy were not in conformity with the Bankrupt Law and that the corporation was not insolvent.

First.—Among the several questions presented is one relating to the right of the receiver to be heard. I do not doubt that he has a sufficient standing in court for the purpose of the motion. He is in possession of the assets of the bankrupt, and if he chooses to relinquish his lien upon the funds, can doubtless prove a claim against the bankrupt for his expenses in executing his trust, and for his commissions or services.

Second.—Whether or not the corporation was insolvent is a question not open on this motion. The decisions are, that in the case of an individual who has been adjudicated a bankrupt on his own petition, the adjudication cannot be assailed by proof that he was not, in fact, insolvent; that if he owes debts and resides within the jurisdiction, as specified in Section 5014, Chapter 2, title 61 of the Revised Statutes of the United States, the court has jurisdiction to entertain his petition and adjudicate him a bankrupt; that the filing of the petition is *per se* an act of bankruptcy, and so declared by the section in question, and the solvency or insolvency of the debtor is not

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material. There is no distinction in this regard between proceedings by individuals and by corporations.

Third.—The serious and doubtful question in my view is whether the policy-holders in the corporation are corporators within the meaning of Section 122, Chapter 6, title 61 of the Revised Statutes of the United States. If they are, not having been notified of the meeting called for the purpose of authorizing proceedings in bankruptcy, and the proceedings not having been authorized by the vote of the majority of the corporators, the filing of the petition was not the act of the corporation within the section, and a condition essential to the jurisdiction of this court does not exist; in which case, although the proceeding might not be assailable collaterally, the adjudication may be attacked in the proceeding itself, by a motion to set it aside.

A corporator is one who is a member of the corporation, one of the stockholders or constituents of the body corporate.

The charter of this corporation provides that every stockholder shall be entitled to one vote for trustee, for each and every share of the capital stock standing in his or her name on the books of the company, and every holder of a policy of the company for the whole term of life, or an endowment policy for five hundred dollars and upward, and which has been in existence for one full year, shall be entitled to one vote for each five hundred dollars so insured.

The charter also provides that in each year, after placing to the credit of the stockholders seven per cent. on the amount of the capital, and a further sum of one-fifth the residue of the profits as a reserve fund for retiring the capital stock, the remaining four-fifths shall be placed to the credit of the policyholders, who to that extent shall participate in all the profits of the company until the retirement of the capital stock, after which the whole profits shall be divided among the policyholders.

While policy-holders are not holders of scrip, which evidences their right to an interest in the assets of the corporation, and while their interests are not transferable, like those of the

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stockholders, in all other respects their position toward the corporation is the same as that of the stockholders.

Neither are personally liable for assessments, or otherwise, beyond the sum fixed by contract with the company; the stockholders' liability being that assumed in their subscriptions for stock, and the policy-holders' that assumed in the policies issued to them. Both have a voice in the management and a share in the profits, the extent of which is not material in ascertaining their legal status. There is a community, though not an equality of interest in the assets and of control in the management which constitutes both classes members of the corporation.

I think it is the intent of the section of the Bankrupt Law, under which proceedings in bankruptcy by corporations are authorized, that the voice of all who have a right to participate in the management of the corporation and to share in its assets, shall be heard and obeyed before an adjudication, which is essentially a dissolution of the corporation, shall be obtained.

It is ordered that all proceedings in bankruptcy be set aside.

COURT OF APPEALS—MARYLAND.

JUNE, 1876.

The Bankrupt Act does not forbid a creditor to take any contract, covenant or security from a third party as an inducement to forbear *instituting* proceedings against his debtor.

But to constitute the forbearance a valid consideration for such contract, covenant or security, the creditor must, at the time of receiving it, have a right to proceed in bankruptcy against his debtor.

SAMUEL ECKER v. DANIEL BOHN.

THIS suit was instituted to recover from the appellant a sum of money alleged to be due by Jacob S. Bohn to the appellee. The declaration alleged that Jacob S. Bohn was indebted to the plaintiff for money paid by the plaintiff for the said Bohn, and the same was well-known to the defendant,

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that said Bohn conveyed and transferred his equitable interest in certain real estate lying in Frederick County to the defendant; that said Bohn, at the time of such transfer and assignment, was insolvent, and the same was well-known to the defendant; that after the said conveyance and assignment, the plaintiff was about to institute proceedings, in the District Court of the United States for the District of Maryland, against the said Bohn, for the purpose of having and procuring the said Bohn to be adjudged and declared a bankrupt, and the said interest of the said Bohn in and to said real estate to be sold and the proceeds of the sale thereof to be applied to the payment of his debts, and amongst others, to the payment of the said debt of the said Bohn due to the plaintiff, and that the said defendant, in consideration that the said plaintiff would abstain from instituting the proceedings aforesaid, undertook and faithfully promised to pay the said plaintiff the debt due to him as aforesaid by the said Bohn; that the plaintiff, relying on the said promise and undertaking of the defendant, and in consideration thereof, did abstain from instituting said proceedings; but that the defendant refused, although often requested so to do, to pay to the said plaintiff the said sum of money due from Bohn as aforesaid, according to the said promise and undertaking of the defendant in that behalf. The defendant demurred to the declaration. The court overruled the demurrer and the cause proceeded to trial. The plaintiff offered the following prayers, which the court granted: 1. That if the jury shall find from the evidence that the defendant promised to pay the plaintiff's debt, or any part thereof in the *narr.* mentioned, that the plaintiff was liable for a certain Jacob S. Bohn, upon a certain note to Nicholas Metcalfe, that said liability was upon the plaintiff at the time of said promise made, if the jury so find, that then the verdict of the jury must be for the plaintiff, for the amount paid by him on account of Metcalfe's note, even though the jury should further find that the note for one hundred and fifty dollars, eight months after date, payable, offered in evidence, was obtained from said defendant by fraud, violence, or intimidation, if the jury should

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find such on the part either of the plaintiff, or any agent of the plaintiff, if the jury should find that the plaintiff had any agent for the obtention of said note.

2. That if the jury shall believe from the evidence that the defendant promised to pay the causes of action, or any of them proved by the plaintiff, subsequent to the making of the deed from Jacob S. Bohn to defendant, if the jury should so find said deed, and shall further find that the plaintiff paid said several causes of action, or any of them, and that the defendant has never paid the same to the plaintiff, that then the verdict of the jury must be for the plaintiff, even though the jury should further find that before the making of the said promise to pay the plaintiff, or at any other time the defendant had paid debts due by Jacob S. Bohn, which exceeded the value of the property conveyed to defendant by said Jacob S. Bohn, if the jury should so find.

The defendant offered nine prayers, of which only the following, which the court rejected, need be set out: 3. That if the jury shall believe, that at the time the promise was made by the defendant to pay the indebtedness of Jacob S. Bohn, that the consideration of said promise to pay the debts of Jacob S. Bohn by the defendant, was that the plaintiff on his part agreed with said defendant not to institute proceedings in bankruptcy against the said Jacob S. Bohn; and shall further find that at the time of said promise and undertaking of said defendant, the said Jacob S. Bohn was indebted to the plaintiff in a less sum than the sum of two hundred and fifty dollars, paid and advanced by the plaintiff for the said Jacob S. Bohn, at his request, an amount insufficient to give jurisdiction to the District Court of the United States for the District of Maryland, where said Jacob S. Bohn resided at the time of the alleged promise, in cases of involuntary bankruptcy, then the plaintiff is not entitled to recover in this action on the first count of the amended declaration, and their verdict must be for the defendant. The verdict and judgment were for the plaintiff, and the defendant appealed.

Charles W. Ross and James McSherry, for the appellant,

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cited *Hutton v. Padgett et al.* (26 Md., 228); *Elder v. Warfield* (7 H. & J., 391); *Kirkham v. Marter* (2 B. & Ald., 613); *Fish v. Hutchinson* (2 Wilson, 94); *Watson v. Randall* (20 Wend., 201); *Simpson v. Patten* (4 Johns., 422); *Jackson v. Rayner* (12 Johns., 291); *Davis v. Holding* (1 M. & W., 159); *Ex parte Thompson* (1 Ves., Jr., 157); *Bruce v. Lee & Mullikin* (4 Johns., 419); *Tucker v. Wood* (12 Johns., 190); *Keep v. Goodrich* (ib., 397); *Lamar v. McNames* (10 G. & J., 116); 1 Parsons on Contracts, 365, 366; *Wade v. Simeon* (2 M., G. & S., 548 [52 E. C. L. R.]); *Maull v. Vaughan* (45 Ala., 134); Bankrupt Law, § 19; Bankrupt Act, Sec. 3.

Wm. P. Maulsby, Jr., and Milton G. Urner, for the appellee, cited *Thomas v. Delphy* (33 Md., 373 et seq.); *Andre v. Bodman* (13 Md., 241); *Elder v. Warfield* (7 H. & J., 391); Roberts on Frauds, 232; *Williams v. Leper* (3 Burr., 1886); *Nelson v. Boynton* (3 Met., 396); De Colyar on Guar., &c., 97 et seq.; 1 Parsons on Cont., 365 et seq.; *Elting v. Vanderlyn* (4 Johns., 237); *King v. Upton* (4 Greenl., 387); *Hamaker v. Eberley* (2 Binney, 506); *Pillans v. Van Mierop* (3 Burr., 1663); *Jones v. Ashburnham* (4 East., 455); Chitty on Cont., 35; 1 Pars. on Conts., 368.

GRASON, J.—This is an appeal from the Circuit Court for Frederick County, and the record shows the same looseness and irregularity in the pleadings, which we have taken occasion to condemn in the opinion of this court, filed at the present term in the case of *Norwood v. The State* (45 Md., 68). Trusting that what we there said of such practice will have the effect of remedying it, we shall proceed to consider such of the questions, presented upon the record, as we deem material to the decision of this case. Upon the demurrer it was contended that the declaration was insufficient to justify a recovery, first, because it did not allege that the promise of the defendant to pay the debt of Jacob S. Bohn was in writing; second, because the promise, as stated in the declaration, is in violation of the United States Bankrupt Law and against public policy; and third, because the declaration does not aver that Jacob S.

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Bohn had committed an act of bankruptcy, by reason of which omission it did not appear that the appellee had any right to file a petition in bankruptcy against him, the forbearance to file which is alleged as the consideration for the appellant's promise to pay Jacob S. Bohn's debt to the appellee. 1st. A mere promise to pay the debt of a third person, without any new or superadded consideration moving to the promisor from the plaintiff, is within the Statute of Frauds, and, to be binding, must be in writing, and must state the consideration. (*Hutton v. Padgett*, 26 Md., 228.) But it is not necessary *to allege in the declaration* that the promise is in writing. If it appear in proof at the trial to be in writing, it is sufficient.

2d. The Bankrupt Act forbids any creditor, or any other person as trustee for such creditor, to take from the bankrupt any contract, covenant, or security, for the payment of any money as a consideration to induce the creditor to forbear opposing the application for the discharge of the bankrupt, and imposes penalties and forfeitures upon any creditor who shall take such contract, covenant or security. But there is no provision in that Act which forbids the creditor to take from a third party such contract, covenant, or security, as an inducement to forbear instituting proceedings against his debtor, for the purpose of having him declared a bankrupt. *Before any proceedings in bankruptcy have been commenced*, we have no doubt that any creditor may take such contract, covenant, or security from a third party as an inducement to forbear instituting proceedings in bankruptcy against his debtor, without violating any provision of the Bankrupt Act or contravening public policy.

3d. The declaration alleges that Jacob S. Bohn was indebted to certain parties, that he was insolvent and unable to pay his debts, and had conveyed and transferred his real estate to the appellant, who had accepted the same without paying any consideration therefor. These facts, if true, constituted an act of bankruptcy on the part of Jacob S. Bohn and the statement of them in the declaration is equivalent to a

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direct allegation that he had committed an act of bankruptcy. The demurrer was therefore properly overruled.

But, while the declaration states a good cause of action, the record presents a state of facts which are conclusive against the appellee's right to recover in this action. The proof is clear and uncontradicted that, at the time the appellant made the promise stated in the declaration, the only debt due by Jacob S. Bohn to the appellee, which was provable under the Bankrupt Act, was one hundred dollars. It is true that the appellee was at that time surety for Jacob S. Bohn on two other notes, one to Metcalfe and the other to Pfontz, but he expressly swears that he had paid neither of them at the time of the appellant's promise to pay their amounts to him, and that Metcalfe's note was unpaid at the time of the trial of the case. The debts to Metcalfe and Pfontz, not having been paid by the appellee at the time of the appellant's promise, they were not provable by the appellee in bankruptcy under Section 5070 of the Revised Statutes of the United States, which provides that any person liable as bail, surety, guarantor or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor, if the creditor had proved the same, although such payment shall have been made after the proceedings in bankruptcy were commenced. It is clear, therefore, that the appellee held but one claim against Jacob S. Bohn, which was provable under the Bankrupt Act, at the time of the appellant's promise, and that was the note for one hundred dollars.

It, therefore, follows that the appellee had no right, under the Bankrupt Act of 1867, Chap. 176, to file a petition in bankruptcy against Jacob S. Bohn, for the 39th Section of that Act provides, "that a party may be adjudged a bankrupt, on the petition of one or more creditors, the aggregate of whose indebtedness, *provable under this Act*, amounts to at least two hundred and fifty dollars, provided such petition be brought within six months after the act of bankruptcy shall have been committed." It is plain, therefore, that the appellee had no

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right to proceed in bankruptcy against Jacob S. Bohn at the time the promise of the appellant, mentioned in the declaration, was made. To constitute forbearance to sue a good consideration for a promise, there must exist, at the time of the promise, a good cause of action. If there be no good cause of action existing at that time, the promise is without consideration, and cannot be enforced, although it be in writing. (1 Parsons on Contracts, 365, and the authorities there cited in note c; *Wade v. Simeon*, 52 Eng. Com. Law Repts., 548, 565, marg.; *Jones v. Ashburnham*, 4 East., 455; *Hartle v. Stahl and wife*, 27 Md., 157.)

The appellant's third prayer ought therefore to have been granted. Both of the appellee's prayers were fatally defective, because they required the jury to find for the plaintiff upon their finding only part of the facts necessary to be found in order to entitle the plaintiff to a verdict, and upon a promise, which, as stated in the prayers, was clearly within the operation of the Statute of Frauds.

For these reasons, as well as for those before stated, these two prayers ought to have been refused.

As the view we have taken of this case is conclusive against the appellee's right to recover, it becomes unnecessary for us to pass upon the questions raised by the exceptions taken during the progress of the trial, or by the appellant's rejected prayers.

Judgment reversed.

UNITED STATES DISTRICT COURT.—S. D. NEW YORK.

APRIL 24, 1877.

The Bankrupt Court has a right to, and will on application enjoin creditors from harassing the debtor as long as his composition proceeding is pending.

An injunction in such case can extend only to unsecured debts or debts in respect to which any security has been surrendered.

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The proceeding is pending until the time allowed by the resolution for making the last payment has expired.

A general provision in a resolution of composition that a payment of so much money, at such time or times, to be evidenced by such and such notes, shall be accepted by the creditors in satisfaction of the debts due them, is not, as respects the creditors, an executing provision which the court is authorized to enforce. A tender of the money according to the terms of such composition is equivalent to payment, but the court cannot imprison the creditor for contempt unless he will physically take the offered money.

In re RICHARD H. HINSDALE.

W. S. Palmer, for the debtor.

Bell, Bartlett and Wilson, for Kayne, Spring, Dale & Co.

Henry M. Walker, for L. M. Bates & Co.

BLATCHFORD, J.—In this case a petition in involuntary bankruptcy was filed against the debtor on the 25th of January, 1877. No adjudication of bankruptcy has been made.

The debtor filed a petition on the 9th of February, praying for a meeting in composition. A meeting was ordered and such proceedings were had that a composition was proposed and accepted. It was confirmed by the court, by a final order, on the 10th of March, 1877.

The terms of the resolution of composition are, "that the payment of thirty-five cents on the dollar of the debts due from the said Richard H. Hinsdale to his creditors respectively, to be paid in money at the times therein stated, and to be evidenced and secured in the manner following, that is to say: one third thereof to be paid in cash within thirty days from the entry of the order directing the composition resolution to be recorded, and the schedules exhibited to the meeting of creditors filed, the balance to be paid in two equal instalments at three and six months from February 15, 1877, to be evidenced by the notes of said Richard H. Hinsdale, the last note to be endorsed by Thomas Lord, Jr., of Huntington, Long Island, who is satisfactory, as endorser, to the undersigned, shall be and is hereby accepted by the undersigned in full satisfaction and discharge of the debts due and owing to them from said Richard H. Hinsdale."

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The debtor now applied to the court for an order requiring four of his creditors, namely, L. M. Bates & Co., Moore, Tingue, & Co., Kayne, Spring, Dale & Co., and Cresswell, La Lanne & Co., to accept the composition. The terms of the application as to the first three of the creditors are that the court will require them "to accept and be bound by said composition" and to "release and discharge all property" they "may have belonging to said Hinsdale," and to "discontinue all suits and actions pending against him" upon their claims herein. The terms of the application as to the fourth creditor are that the court will require them "to accept, receive and be bound by the composition resolution and proceedings herein, and for leave to pay the money and deposit the notes coming to" them "into court." It is shown that within thirty days after the 10th of March, the debtor tendered to the four creditors respectively the proper sums of money and the proper notes provided for by the resolution of composition, and that such tenders were not accepted.

Cresswell, La Lanne & Co. have not proved their debt.

Moore, Tingue & Co. proved their debt in the composition proceedings. Kayne, Spring, Dale & Co. proved their debt in the composition proceedings, and are recorded as being represented at the meeting, but they took no other part in the proceedings. They now set up, in opposition to the application of the debtor, sundry matters on which they rely as tending to show that the composition is one which ought not to have been confirmed, that the debt of the debtor to them was contracted by fraud, and that they do not desire to take their dividend in composition, because they prefer to come in for their dividend under a voluntary assignment made by the debtor in Pennsylvania of property of his in that State.

L. M. Bates & Co. did not prove their debt in the composition proceedings. They have commenced attachment proceedings in Pennsylvania against property of the debtor, and also an action in that State against him to recover their demand. Their attachment proceedings were commenced on the 9th of January, 1877. On the 22d of February they obtained a judg-

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ment against the debtor in a State Court in Pennsylvania, and made a levy on a stock of goods there.

They claim that their claim relates back to the date of their attachment; that the composition cannot affect the security they hold; that, as there has been no adjudication in this case and no assignee in bankruptcy has been appointed, this court has no possession of or jurisdiction over any assets in Pennsylvania; that, to enjoin L. M. Bates & Co. now will deprive them of their rights under the laws of Pennsylvania; that the debt to them was contracted by fraud, and will not be discharged by the composition proceedings; that they have proved their debt under the assignment in Pennsylvania, and the estate there will pay fifty-five per cent.; and that the composition here was not and is not for the best interest of all the creditors.

By the statute (Act of June 22, 1874, Section 17, 18 U. S. Stat. at Large, 182), the debtor is to propose a composition. The creditors are to pass a resolution to accept the composition and are to confirm such resolution. The court is then to confirm the composition. The statute contains these provisions:

“The provisions of a composition accepted by such resolution in pursuance of this Section shall be binding on all the creditors whose names and address and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors. . . . Every such composition shall, subject to provisions declared in said Act, provide for a pro rata payment or satisfaction, in money, to the creditors of such debtor, in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up. . . .

“The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of

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court." It is contended, for the debtor, that the court has power to grant the application now made and to enjoin the creditors from doing anything, except to receive the money and notes, and that in doing this the court will be enforcing the provisions of the composition. On the part of the creditors, it is urged that there are not found in the composition in this case any provisions which are enforceable against a creditor; and that the court cannot compel a creditor to do an affirmative act which is not provided for in the resolutions of composition and is not thereby specifically agreed by the creditors to be done.

I am of the opinion that when the statute says that the court may enforce, on motion made, in a summary manner, "the provisions of any composition," it extends only to the executing provisions of the composition, to those things which the resolution of composition provides shall be done in the future by some one named in it, as specific affirmative acts. Thus, if the resolution of composition provides that the debtor shall pay money, or give promissory notes to the creditors, or that the debtor shall execute a deed of trust, or a conveyance, or mortgage of property as security for the payments of the composition, or that a general assignee under a State Law shall convey to the debtor the assigned property to be held by him free from any claim of creditors under the assignment, or that the assignee in bankruptcy shall transfer to the debtor or to a trustee for the creditors the property in his hands—these and kindred provisions of an executing character are provisions which may be enforced, on motion, in a summary manner.

But a general provision in a resolution of composition that a payment of so much money, at such time or times, and to be evidenced by such and such promissory notes, shall be accepted by the creditors in satisfaction of the debts due to them from the debtor, is, in no proper sense, an executing provision, as respects the creditors. The language is used because it is the language of the statute. But the statute, in saying that the creditors may resolve "that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them

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from the debtor," means merely that they may resolve that the payment of the money for the payment of which the composition provides shall satisfy the debts. If the money is tendered according to the terms of the composition, that is equivalent to payment, but the court has no power to imprison the creditor for contempt unless he will physically take the offered money.

A protection of the debtor, by a summary injunction against the creditor, from the consequences of a refusal by the creditor to take the offered money and recognize the composition, such as the bringing of a suit by the creditor on the debt, is not within the proper purview of the enforcement of the provisions of a composition containing no other provisions than those in the present case.

When a discharge in bankruptcy is obtained under Section 5114 of the Revised Statutes, the Bankruptcy Court never undertakes to protect the debtor thereafter, by summary injunction, in the bankruptcy proceedings, from a suit against him by a creditor, to recover a debt. The debtor is left to set up the discharge by way of plea to the suit. There is no reason why any different course should be pursued after the close of a composition. If a suit is brought, the composition may be set up in defence; and, even if the creditor is in a position to at once issue execution against the debtor's property, the like thing happens often where a discharge is granted, and it is no greater hardship for the debtor to initiate proper measures to be relieved, after the close of composition than after a discharge.

It never could have been intended that the Bankruptcy Court should determine, in a summary way, such questions as are intended to be raised in the present case, in respect to the effect of the composition between the debtor and his creditors—the question as to the right of a creditor who proved no debt in the composition proceedings, to enforce a security held by him, for the giving up of which there is no specific provision in the composition—or the question as to whether the composition satisfies a debt created by fraud. These questions ought to be settled in plenary suits brought in a proper forum.

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The fact that if the Bankruptcy Court exercises the jurisdiction now invoked it would have to determine such questions, indicates that the only proper course is for that court, after the close of a composition, not to interfere except to enforce the specific executing provisions of the composition.

The language and intent of the statute are abundantly satisfied by confining the action of the court to such remedies alone.

The Bankruptcy Courts in the United States which have considered this question have adopted the views above set forth. (*In re Tooker*, 14 N. B. R., 35; *In re Lytle*, Id., 457.) They are general views, subject to modification by the circumstances of the particular case and according to the terms of the resolution of composition. In the present case, it being an involuntary case and there having been no adjudication of bankruptcy, and no warrant of seizure of the debtor's property, the court has acquired no jurisdiction over the debtor's property. The injunction now asked for is not sought under the authority of Section 5024, as an injunction to restrain an interference with the debtor's property, until the hearing on the order to show cause why there should not be an adjudication. The Bankruptcy Court, however, has the undoubted right to protect a debtor while his composition is pending. Inasmuch as it is only necessary that a case of bankruptcy should be pending by or against a debtor, whether an adjudication in bankruptcy shall have been had or not, to authorize a proceeding in composition, and inasmuch as (Section 4991) the filing of a petition for adjudication either by or against a debtor is deemed the commencement of proceedings in bankruptcy so as to cause the case to be pending, it follows that the court in which a composition proceeding is properly pending has a right to enjoin the creditors from harassing the debtor so long as his composition proceeding is going on. As the proceeding in composition is a proceeding in bankruptcy, the court has not only (Section 563) original jurisdiction of the proceeding, but (Section 711) jurisdiction of it exclusive of the courts of the several States.

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Such jurisdiction (Section 4972) extends to the close of the composition proceeding.

The close of such proceeding is not necessarily, nor is it ever, the order of the court that resolution of composition be recorded.

Even where the composition is all to be paid in money at one time, a few days after the making of such order are necessarily allowed for such payment. But there are many cases like the present one. Here one-third of the composition is to be paid by April 9, 1877, one-third on May 18, 1877, and one-third on August 18, 1877. The creditors have given this time to the debtor.

Until such time expires the debtor is not bound to make his payments. Until then the composition is still pending, because, until he shall fail to make the payments, it cannot be determined whether the composition will or will not fail. The debtor is entitled to be protected against suits on the original debts until such time arrives, in equal measure with his title to be protected before the resolution of composition was passed or confirmed. The debtor cannot, until such time arrives, use his composition proceedings as a shield against the original debts, in suits to be brought or pending either by him or against him. Therefore, in the meantime, the Court of Bankruptcy must protect him by injunction. But the debts to which an injunction can extend are only the debts to which a composition can extend, that is, unsecured debts, or debts in respect to which any security has been surrendered or given up.

I am of opinion, therefore, that the debtor is entitled to an injunction to restrain these four creditors from bringing or further prosecuting any suits against him in respect to unsecured debts, the amounts of which are set forth in his filed statement, until the 18th of August, 1877.

There is no objection to an order giving leave to the debtor to deposit in this court the money and notes to which these four creditors are now entitled under the resolution of composition.

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SUPREME COURT—ALABAMA.

A claim to a homestead exemption, under the laws of Alabama, must be asserted before a sale.

The validity of a sale of property by an assignee in bankruptcy cannot be questioned in a collateral proceeding in the State Courts.

If a bankrupt fails to claim such exemption in his schedules, he must be deemed to have waived it.

If the bankrupt has, from inadvertence, misdescribed in his schedules the land claimed by him as exempt, the Bankrupt Court alone has power to correct such error. A State Court cannot receive mere parol evidence to cure such mistake.

When the sale by the assignee took place more than two years after the assignment to him, the limitation of suits by and against assignees prescribed by the Bankrupt Act cannot be set up as a defense to a collateral action brought against the bankrupt by one claiming title under such sale. The bankrupt should avail himself of it on application to vacate the sale.

SYLVESTER STEELE v. B. C. MOODY.

THIS was a real action in the nature of ejectment, brought by the appellant, Sylvester Steele, against the appellee, B. C. Moody, on the 22d day of June, 1872, to recover the east half of the northwest quarter, and the northeast quarter and east half of southeast quarter—all in section one, township seventeen of range one, east, lying in St. Clair County.

Moody disclaimed possession of any of the land at the time of suit brought, except as to the east half of the northwest quarter of section one, township seventeen, range one, east, "which he claimed as a homestead under the Bankrupt Act of Congress of March 2d, 1867, and the laws of Alabama." He also averred by plea that at and before the commencement of the suit the remainder of the lands were in possession of one Wiley Moody, who held them adversely to all the world, &c. All the lands sued for formerly belonged to the appellee, but prior to filing his petition in bankruptcy he had sold and conveyed a portion of them to his son, Wiley Moody, to obtain money to pay the costs and expenses of the Court of Bankruptcy.

Appellee was adjudicated a bankrupt on his own petition on the 2d day of May, 1868, and on the 20th day of June follow-

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ing, an assignment of all his property was made by the register to Forman, as assignee. On the 30th day of December, 1871, the assignee, under an order of the Court of Bankruptcy, made October 2d, 1871, sold the premises sued for, and made a deed thereof to appellant, who was the highest bidder. Appellee had been in possession of the lands claimed as a homestead for many years, and the location of said lands, as well as Wiley Moody's claim to the portion sold him, was known to the assignee, Forman, for more than two years after the adjudication of bankruptcy against the appellee, and the testimony of all the witnesses went to show that the lands on which he resided at the filing of his petition were the east half of the northwest quarter of section one, township seventeen, range one, east. The testimony as to the value of the homestead tract, at the time of the filing of the petition was conflicting, some witnesses estimating its value at \$1,500, and others at \$1,000.

The lands claimed as a homestead were not specified in the schedules filed by the bankrupt, nor were they ever set apart or allowed by the assignee or certified by the register or judge, but remained in the possession of the bankrupt without any demand to surrender them. Some time in the summer of 1868, the bankrupt was informed by the assignee that he (the assignee) "could not make the assignment of a homestead to him, because the numbers of the land were wrong in his schedules in bankruptcy," and appellee told him that "he knew nothing about land numbers and subdivisions, etc., and could not tell whether the numbers were right or wrong in the schedules, but that he claimed the eighty acre tract on which he lived as a homestead."

The appellee, who was an illiterate man, testified that when he filed his schedule in bankruptcy, he intended to claim the land which he occupied, by its proper numbers, as a homestead, but that he knew nothing about the numbers and fractional divisions of land, and that, at the time of filing his petition, as well as since, he was the head of a family, residing in St. Clair County, in this State. At the time of the trial he had obtained a discharge in bankruptcy.

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The court gave the following, among other charges, to the jury: "3d. If the jury believe from the evidence that the defendant claimed the east half of the northwest quarter of section one, township seventeen, range one, east, as a homestead, and that he was residing on it at the time of filing his petition in bankruptcy, then the title to it never passed to his assignee unless defendant voluntarily surrendered it to him. 4th. If the jury believe from the evidence that the defendant was residing on said half-quarter section of land at the time of filing his petition in bankruptcy, and that he claimed the same as exempt to him as a homestead under the Bankrupt Act of 1867, or intended to claim the same as such, and failed to do so by a misdescription of land numbers, and that such fact was known to the assignee, Forman, and that he knew the lands on which Moody resided, and knew that he claimed said eighty acres as a homestead, then the plaintiff cannot recover in this suit as to this half-quarter section of lands. 5th. If the jury believe from the evidence that, at the time defendant went into bankruptcy, he claimed the east half of the northwest quarter of section one, township seventeen, range one, east, in St. Clair County, as a homestead, under the Bankrupt Act of 1867, or that he intended to claim the same as such and failed to do so by reason of a misdescription of the lands or numbers thereof, and that such mistake was known to the assignee, who also knew the lands on which defendant resided, and that the lands were so claimed or intended to be claimed by him as a homestead at the time defendant went into bankruptcy, and if they believe defendant held the same as his homestead for more than two years after such knowledge was acquired by the assignee and before the sale to plaintiff, then the plaintiff is bound by the limitation of two years in said Bankrupt Act of March, 1867, regardless of the value of said lands. 6th. If the jury believe from the evidence that the defendant was residing upon said half-quarter section at the time of filing his petition in bankruptcy, and that he claimed the same as exempt as a homestead, under the provisions of the Bankrupt Law of 1867, then, so far as to said half-quarter section, they must find for

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the defendant, although they may believe the same was worth, at the time of the filing of the petition in bankruptcy and at all times since, more than five hundred dollars in gold, and whether the same or any part thereof had ever been set off to him as exempt by his assignee or by the authority of the United States Bankrupt Court. 7th. Before the plaintiff can recover the other lands mentioned in the complaint, he must prove that he had the legal title paramount to the defendant's title to the lands and right to possession, and that defendant was in possession of the same at the commencement of the suit. 8th. If the jury believe from the evidence that Wiley Moody was living upon said northeast quarter of section one, claiming all of said quarter-section as his own, and that this claim was open and notorious for more than two years after such claim was made known to the assignee, Forman, and before the sale by said assignee to plaintiff, then the plaintiff cannot recover said quarter-section or any part thereof in this action, although they may believe that such claim and possession were acquired from his father for the purpose of defrauding the creditors of his father."

The plaintiff excepted to the giving of each of these charges, and they are now assigned as error.

Hewitt & Walker, for appellant.

The bankrupt had only the exemptions given by our laws in 1864. Under these laws his homestead must have been claimed, and, if need be, set apart to the head of the family before sale, else it was lost. Our exemption law did not absolutely set apart the homestead, but conferred a right to have a homestead if claimed in time. (30 Ala., 225; 10 Ala., 270; *Bell v. Davis*, 42 Ala., 460.) The statute of limitations of two years had nothing to do with the case. (17 How., 315.) Several of the charges given assume the fact that appellee was the head of a family.

The sale to Wiley Moody was intended to defraud the assignee, and the title passed to Forman, notwithstanding

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Moody's conveyance from appellee. (5 Mason, 143; 4 Black, 85; 29 Ala., 112.)

John W. Inzer and Le Roy F. Boz, contra.

Under the Bankrupt Law there are two classes of exempt property: 1st, that which may be set aside at the discretion of the assignee; 2d, that which is absolutely and unconditionally exempt by the act itself—the bankrupt's title to which is not impaired, changed, or affected in any way by any act or omission of the assignee, or by any proceedings in the Bankrupt Court. (See Section 14 of the Act.) By the terms of that Act the State exemption laws are made part of the Bankrupt Law, and there is no discretion in the assignee not to allot the homestead. The failure of the assignee to act cannot affect a right derived, not from the act of the assignee, but from the law itself. (*In re Jones*, 4 C. L. N., 66.) The title to the homestead not passing, the assignee had no claim to it; if he did, however, the appellee held adversely to him for more than two years, and this barred his right, or any one claiming under him, to sue in relation to property of the bankrupt. If the charges complained of were merely misleading, appellant should have asked explanatory charges.

BRICKELL, J.—The 14th Section of the Bankrupt Law, as originally enacted, and as of force, not only when the defendant was on his own petition adjudicated, but when he obtained his discharge as a bankrupt, excepted from the operation of the assignment of his estate such property other than that specially designated, as was “exempted from levy and sale upon execution or other process or order of any Court, by the laws of the State in which the bankrupt has his domicil at the time of the commencement of the proceedings in bankruptcy,” to an amount not exceeding that allowed by the laws of the State in force in 1864.

The law of this State of force in 1864 exempted from levy and sale, by any legal process, “such real property as may be

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selected by the head of the family, to include the homestead, not to exceed three hundred and twenty acres, and in value not to exceed five hundred dollars; all burying-grounds and lots set apart for the interment of deceased persons, and the improvements and appurtenances to the same appertaining, are reserved for the use of the families to whom they respectively belong." (R. C., Section 2880.) The value of the real property was to be ascertained by three disinterested freeholders, summoned by the sheriff, who made the valuation, and if necessary set off the lands by metes and bounds. (R. C., Section 2881.)

The exemption was not conferred on every person resident within the jurisdiction of the State, debtor though he was, and reduced to insolvency. It was only when connected with others, who were legally dependent on him, and to whose maintenance the law compelled him, that he was entitled to claim the exemption. He must have been the head of a family residing with him, within the State, or the legal relation of dependence contemplated by the statute did not exist, and there was no right to an exemption of either personal or real property. (*Allen v. Manasse*, 4 Ala., 554; *Abercrombie v. Alderson*, 9 Ala., 981; *Boykin v. Edwards*, 21 Ala., 261; *Keiffer v. Barney*, 31 Ala., 192.)

The statute conferred on the debtor standing as the head of a family, sustaining to others a legal relation rendering them legally dependent on him, and to whose maintenance he was legally compellable, a *privilege*, not ripening into a *right* until it was asserted and exercised. And it must have been asserted and exercised before a sale of the property, or it was lost. (*Gresham v. Walker*, 10 Ala., 370; *Simpson v. Simpson*, 30 Ala., 225; *Bell v. Davis*, 42 Ala., 460.) The statute did not execute itself—it did not positively inhibit the levy and sale of property specifically designated, and distinguishable from all other property the debtor owned or possessed. It did not of itself set apart any property real or personal (except burying-grounds), and free it from levy and sale for the payment of debts. Its language was: "the following property may be

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permanently retained for the use of every family in the State, exempt from levy and sale by any legal process," followed by an enumeration of different kinds of personal property, from which the debtor could make a selection, either in quantity or value, and then such real property as may be selected by the head of the family, to include the homestead, &c. It was not an absolute exemption, but the privilege of the debtor to select and retain. A privilege it was optional with him whether he would exercise or not.

If he permitted the levy on such property, and accepted its custody as the bailee of the sheriff, the levy was good, and the sheriff as much bound by it as he would have been by the levy on property to which no such claim could have been made. (*Gresham v. Walker, supra.*) If the levy and sale was of real estate, the failure to claim the exemption before a sale, even though it was made without a notice to, and without the knowledge of the debtor, was a loss of the privilege. (*Bell v. Davis, supra.*) As to real property, it is clear to perfect the exemption, to make it available, the debtor must have been active. He must have *selected it*, and its value must have been ascertained if, after the selection, there was any dispute about it, by three disinterested freeholders summoned by the sheriff. There could be no dispute as to value until he made the selection. Selection itself implies choice, preference, made known to others.

The last clause of the statute executes itself. No act of the debtor or of any one else was necessary to its full operation. It exempted absolutely and unconditionally, without claim from any one, "all burying-grounds and lots for the interment of deceased persons."

These were reserved from levy and sale, though no claim was asserted to them, and devoted to the use of the families to whom they respectively belonged, without regard to their value. Not so with other real property; it must have been selected by the head of the family.

When selected, if a doubt or dispute arose, it must have been valued. When valued, if necessary to its identification

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and distinction from other lands, it must have been set by metes and bounds. All this must have preceded the sale under legal process. Until it was done the privilege of the debtor did not ripen into a right. Such were the statutes of force in 1864, to the benefits of which the defendant was entitled on the adjudication in bankruptcy.

An adjudication of bankruptcy is in the nature of a statute execution for all creditors. The assignee, as the representative of creditors, stands in the relation of a judgment-creditor, capable of enforcing every right such creditor could enforce. (Bump on Bankruptcy (9th ed.), 489-90.) The 10th Section of the Bankrupt Law required the justices of the Supreme Court of the United States to frame general orders for regulating the practice and procedure of the District Courts in bankruptcy, and generally for carrying the provisions of the law into effect. These orders they were required to report to Congress. In obedience to this requisition, general orders were framed, and forms prescribed for the various proceedings in bankruptcy. The form of a petition by a debtor desiring to obtain the benefit of the law, and of the several schedules which must be exhibited with it, disclosing the nature, character and consideration of his indebtedness, and a description of all his estate, real or personal, its true condition, and the parts of it subject to or exempt from the payment of debts, were prescribed.

The 32d General Order, as originally framed, and which was of force when the defendant was adjudicated a bankrupt, required an observance of the several forms specified in the schedules. A schedule required to be annexed to a debtor's voluntary petition was entitled: "Schedule B—5. A particular statement of the property claimed as exempted from the operation of said Act, by the provisions of the 14th Section thereof, giving each item of property and its valuation; and if any portion of it is real estate, its location, description and present use. (The property claimed to be exempt under the laws of any State is to be described separately from the rest, and reference given to the statute of said State creating the exemption.)"

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The 19th General Order required the assignee, within twenty days after receiving the assignment, to make report to the court of the articles set off to the bankrupt as exempt under the 14th Section, with the estimated value of each article. The 57th Form was a "certificate of exempted property," to be signed by the judge of the District Court, or register in bankruptcy, setting out the property designated and set apart to the bankrupt as exempt, its particular description and value. The manifest purpose of these orders is, that if a voluntary bankrupt claims the exemptions of property to which the 14th Section of the law entitles him, he shall assert the claim on the filing of his petition. His creditors have the right to be informed what property is so claimed—they have a right to know its kind, and in some instances its value.

The right to the exemption they can controvert, and to their right of controversy it is material they shall be fully informed of the precise property claimed. The whole matter of exemption thus becomes a matter lying within the exclusive jurisdiction of the Court of Bankruptcy. There the right must be asserted, and there it must be resisted and controverted. The Court of Bankruptcy, by the filing of the voluntary petition, in itself an act of bankruptcy, acquires full and exclusive jurisdiction of the bankrupt and his estate. It may be, other tribunals have previously acquired jurisdiction of the bankrupt or of his estate, which the bankruptcy will not displace. But in the absence of any such prior acquisition of jurisdiction, the jurisdiction of the Court of Bankruptcy is full and complete, and exclusive. The title of the bankrupt to the property exempt it was intended should be shown by the report of the assignee setting it apart, and the certificate of its exemption signed by the judge or register. This is full evidence of his right, derived from the court having jurisdiction of his person and estate. No other court can suffer it assailed, or deny to it validity and operation. When his assignee sells to a third person property in which the bankrupt had title at the time of adjudication of bankruptcy, no other court, without encroaching on the jurisdiction of the Court of Bankruptcy, can inquire

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whether such property was exempt from the assignment in bankruptcy. If it should enter on the inquiry, conflicts of jurisdiction and of judgment would inevitably arise, from which only strife and confusion would follow. The Homestead Statute of Georgia seems to allow the wife and children of a debtor to claim a homestead from his lands. The husband having been adjudged a bankrupt, it has been decided there the wife and children could not in the State courts make the claim against the assignee in bankruptcy, or those claiming under him—that the State Courts had no jurisdiction, and the application should be made to the Court of Bankruptcy. (*Lumpkin v. Eason*, 10 N. B. R., 549; 44 Ga., 339; *Woolfolk v. Murray*, 10 N. B. R., 540; 44 Ga., 133.)

Under our statutes in force in 1864, as we have seen, the exemption of real estate allowed a debtor must have been claimed before a sale of the lands under legal process. The adjudication in bankruptcy operating as a statute execution, an exemption of the lands must have been claimed before a sale by the assignee. A failure to claim, in either case, is the mere election of the debtor to waive a privilege he could have exercised. Not making the claim to the exemption in the mode prescribed by the practice and orders in bankruptcy, before a sale by the assignee, he must be deemed to have waived it when a controversy arises between him and a purchaser from the assignee in a State court. No other principle will preserve the harmony and dignity of judicial proceedings, avoid a conflict of jurisdictions, and serve the ends of justice. Suppose the defendant was entitled to an exemption of the land he now claims, and its sale by the assignee was irregular, and his claim was now allowed, a court of the State would be impotent to do justice to the purchaser by compelling a return to him of the purchase money. If he applied to the Court of Bankruptcy for a refunding of the purchase money, he might be met with the answer that the defendant had waived the exemption, and he was entitled to the land for which he had paid. The one court adjudges he shall not have the land, and the other determines to keep the money he paid as its consideration.

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No such unseemly adjudications are in accordance with the law.

The third, fourth, fifth and sixth charges given by the Circuit Court are erroneous. There is in each charge an omission to refer to the jury the ascertainment of a fact material to the exemption, without which claim could not be made to it. That fact is, whether the defendant was the head of a family residing within this State. The charges impliedly assume this fact. We would hesitate to reverse because of the generality of the charges in this respect, or because they may seem to invade the province of the jury.

The probability is, the trial was so conducted as to impress the court and the jury with the belief that though this was a fact dependent on oral evidence, for the determination of the jury, it was not controverted, but rather conceded. The plaintiff could and would have so easily relieved himself from injury in this respect by merely requesting a charge directing the attention of the jury to the fact, if it was disputed, that we repeat we would hesitate to reverse because the charges seem to assume the fact. These charges all proceed on the hypothesis that a mere claim of the exemption of a homestead, made by the bankrupt to the assignee, though not incorporated in the schedules to his petition, and not allowed by the assignee, nor certified by the judge or register, can be asserted in a State court against the purchaser from the assignee.

This hypothesis is erroneous. If the claim was not asserted by its interposition in the schedules to the petition, it was waived and cannot be preferred against the purchaser from the assignee. Perhaps, if the exemption of a homestead was absolute and unconditional, not dependent on any act to be done by the debtor, as is the exemption of burying-grounds, nor at all dependent on quantity or value, a different rule would obtain. But dependent as it is on the assertion of a claim by the debtor, and proceedings being necessary to its ascertainment, as to location, quantity and value, when claimed, the claim is a condition precedent to its allowance. (Smyth on Homesteads, § 56.)

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Two of the charges lay stress upon the fact, of which there was some evidence, that the defendant, in the schedules filed with his petition, intended and attempted to claim the lands as exempt, but from inadvertence misdescribed them. If such mistake was committed, the power of the Court of Bankruptcy to permit its correction by an amendment of the schedules was ample.

This power no other court can exercise, nor can it receive mere parol evidence to cure the mistake.

The limitation of suits by and against an assignee to two years, prescribed by the Bankrupt Law, if it was available to the bankrupt, should have been asserted in the Court of Bankruptcy, on an application to vacate the sale made by the assignee. In defense of this suit it was not available.

The seventh and eighth charges are not strictly correct, but perhaps the error in them was not prejudicial to the appellant. It seems to have been uncontroverted that prior to and at the commencement of the suit the lands referred to in the charges were not in the possession of the defendant, but were in possession of one Wiley Moody, who claimed title to them. This being true, the action for their recovery should have been against him, and could not be supported against the defendant. (*Gayle v. Smith*, June Term, 1874.) The pleas filed by the defendant put in issue the fact of possession at the commencement of suit.

For the errors we have noticed the judgment must be reversed and cause remanded.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 31, 1877.

A creditor who has received a preference contrary to the provisions of Section 5084 of the Revised Statutes cannot prove his debt after the preference has been recovered from him by the assignee.

Where M., in pursuance of a scheme, to obtain a preference for H., a creditor

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of the bankrupt, purchased logs of the bankrupt and subsequently took a transfer of a note held by H. *Held*, That he held such note as trustee for H., and that the acceptance of the logs was a preference.

In re ALEXANDER STEIN.

Dailey & Mackin, for the assignee in bankruptcy.

Castner & Love, for Miller.

BLATCHFORD, J.—Section 5084 of the Revised Statutes provides, that every person who has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to the provisions of the Bankruptcy Statute, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom, until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference. Section 12 of the Act of June 22, 1874, among the causes for which a person may be put into involuntary bankruptcy, specifies as one, that, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, he has made a payment, gift, grant, sale, conveyance or transfer of money or other property, estate, rights or credits, with intent to give a preference to one or more of his creditors, or with the intent, by such disposition of his property, to defeat or delay the operation of the Bankruptcy Statute, and then proceeds thus: "And if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned or transferred contrary to this Act, provided that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this Act was intended; and such person, if a creditor, shall not be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy."

If Miller was not a creditor when he accepted the logs, and so did not accept a preference, there is nothing to prevent his proving the debt he has proved by his amended proof.

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If he is to be regarded as a creditor accepting a preference, then, inasmuch as the preference has been recovered from him by the assignee in bankruptcy by suit, he must be regarded as having accepted the preference under the circumstances specified in Section 5084, and as not having surrendered to the assignee the property he received under the preference, and so being barred by that section from proving such debt. How is his position affected by Section 12 of the Act of 1874?

I see no conflict between the provisions of Section 5084 and those of Section 12 of the Act of 1874. The meaning of the latter section seems to be, that although a person taking a preference may be in a position, under Section 5084, to prove his debt, because he has made a surrender, he shall not even then prove for more than half of his debt, if the case is one of actual fraud on his part. Under Section 5084, actual fraud is of no consequence, if there be a surrender. A suggestion made by me in *In re Riorden* (14 *N. B. R.*, 332), which was not in point in that case, to the effect that the provision in Section 12 applies only where there has been a recovery, is not, I think, on more careful consideration, well founded. I see no ground for holding that there was any intention in Section 12 to provide for, or to recognize that there could be any proof of a debt after a recovery, it having been the settled construction, under Section 5084, that there could be no surrender after a recovery. Section 12 calls its own enactment a "limitation on the proof of debts." It is such. It says that a person in a certain position shall *not* be allowed to prove for more than a moiety of his debt. It does not say that any one shall be allowed to prove a debt. The provision in Section 5084 is, also, a limitation on the proof of debts. It says that a person in a certain position shall *not* prove his debt. Section 12 says, that "this limitation on the proof of debts shall apply to cases of voluntary, as well as involuntary bankruptcy." The limitation in Section 5084 applies to both classes of cases. The limitation in Section 12 is a limitation added to the limitation in Section 5084.

It only remains to consider whether Miller is a creditor

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accepting a preference. It is contended for him that, when he purchased the logs, he was not a creditor; that he took the transfer of the note from Hoyt after he purchased the logs from Stein; that he could not receive a preference unless he was a creditor at the time; and that he has done nothing to vitiate the note since he took a transfer of it. The answer to this view is that the evidence shows that the scheme was one devised by Miller to enable a preference to be obtained for a part of the note held by Hoyt, to the extent of the value of the logs which Miller obtained from Stein. It was indifferent to Miller whether he should pay Stein or Hoyt for the logs; but, if he should pay Hoyt, Hoyt would secure a preference *pro tanto*. The evidence shows that while Miller is the legal holder of the note, as respects the estate in bankruptcy, he holds it really as trustee for Hoyt, and that he obtained the logs really for Hoyt's benefit.

The amended proof of debts must be expunged.

UNITED STATES DISTRICT COURT.—MASSACHUSETTS.

If a mortgage, pledge or lien is given by a principal debtor to secure his surety, and both become insolvent, the holders of the debts for which the surety is bound have an equity to require the property to be applied to the discharge of their debts specifically.

But if the surety has been discharged by the negligence of the creditors, or if the state of the accounts between the parties is such that the surety has lost his lien, the creditors have no equity.

The creditors must apply their security so as to prove against either estate for the deficiency only. If the creditors prove in full, they waive their security.

Ex parte MORRIS. In re FOYE.

In June, 1874, George F. Foye mortgaged his stock and fixtures to his brother John W. Foye, to secure him for all liabilities he had assumed or might assume for mortgagor. Within a few months both parties became bankrupt, and the petitioner was chosen assignee of both estates. He realized

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about nine thousand dollars from the sale of the mortgaged property, and nothing of importance from any other assets in either case. Upon his petition asking directions for the distribution of the assets, the register notified all creditors, and from his report and from the papers on file it appeared that John W. Foye had indorsed for his brother for more than fifteen thousand dollars, all of which debts were outstanding, and formed the bulk of the indebtedness of both estates; that the creditors, holding the notes, had proved against both estates, and most of them had voted for the assignee; that none of them had appeared before him at the hearing of this petition; that one general creditor of George F. Foye had appeared and filed a brief, which was sent to the court.

The register reported that the money received for the stock and fixtures should be divided among the creditors of George F. Foye without distinction, because the holders of the notes had waived any equity they might have had, by proving in full, and voting under both bankruptcies; and because the assets of John W. Foye being insufficient to pay any dividend, his creditors had suffered and could suffer no injury from indorsements, and therefore the mortgage had become inoperative.

LOWELL, J.—It is well settled that if a mortgage, pledge or lien is given by a principal debtor to secure his indorsee or other surety, and both become insolvent, the holders of the notes or other debts for which the surety is bound have an equity to require the property to be applied to the discharge of their debts specifically. Many of the American cases upon this subject are reviewed by the late Judge Hall in *Re Jaycox & Green* (8 N. B. R., 241), and by the learned American editors in 1 Lead. Cas. Eq. (ed. 1859), p. 163. The English decisions I have not seen fully collected, but have had occasion to examine them more than once. Some of the more important of them are *Ex parte Waring* (reported in three places, 19 Ves. Jr., 345, 2 Rose, 182, 2 Glyn & J., 404); *Powles v. Hargreaves* (3 De Gex, M. & G., 430); *Ex parte Carrick* (2 De Gex & J., 208); *Ex parte Copeland* (3 Dea. & Ch., 199); *Ex parte Prescott*

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(*id.*, 218); *Inman v. Clare* (Johns. Eq., 769); *Bank of Ireland v. Perry* (L. R., 7 Exch., 14); *City Bank v. Luckie* (L. R., 5 Ch., 773); *Ex parte Dewhurst* (L. R., 8 Ch., 965).

Under all these decisions, in both countries, the holders of the notes would *prima facie* have the equity which I have referred to. But this equity is obtained by subrogation, and depends upon the equities between the parties to the mortgage. Thus it has been held that if the surety has been discharged by the negligence of the creditors, or if the state of the accounts between the parties is such that the surety has lost his lien, the creditors have no equity. (*Hopewell v. Bank of Cumberland*, 10 Leigh, 206; *Bibb v. Martin*, 14 Smedes & M., 87; *Vaughan v. Halliday*, L. R., 9 Ch., 561; *Ex parte Parr*, Buck, 191.)

It is further settled that the creditors must work out their equity, and apply their security so as to prove against either estate for the deficiency only. (*New Bedford Inst. v. Fairhaven Bank*, 9 Allen, 175; *In re Jaycox & Green*, 8 N. B. R., 241; *Powles v. Hargraves*, 3 De G., M. & G., 430; *Banner v. Johnston*, L. R., 5 H. L., 157; *Ex parte Joint-stock Disc. Co.*, L. R. 19 Eq., 1, and L. R., 10 Ch. 198.) There are many other cases, but none opposed to these. The reason is that the equity is primarily that of the two estates, and the general creditors of each have a right to say that the security shall be applied before the debt is proved. Indeed, the decision of *Ex parte Waring* was put wholly upon the equities of the two estates, and several judges since have said that the secured or *quasi* secured creditors have no equity of their own; but this distinction has not been found useful, as the courts are bound to apply the equity, whoever may ask for the application, and they have found themselves obliged to apply it, in many of the cases, upon the petition of the secured creditors.

It results from this rule, that if the holders of the notes, or other privileged debts, prove in full, they waive their security. (*New Bedford Inst. v. Fairhaven Bank*, 9 Allen, 175; *In re Jaycox & Green*, 9 N. B. R., 241.) I desire, however, to make one or two remarks on those cases. In *Re Jaycox & Green*,

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Judge Hall said, very justly, that if the holders of the secured notes proved in full against the estate of the bankrupt principal, without the consent of the solvent surety, they would thereby release the surety to the extent of the value of the security, and at the same time abandon the security for the benefit of the estate of the principal. He had also said that the assets of the surety, or the fact that he was bankrupt, would probably make no difference, as it clearly would not, because general creditors of the principal had a right to insist that full proof shall not be made against the principal's estate, except upon waiver of the security for their benefit. He, however, permitted the proof in full against the estate to stand, apparently upon the ground that the resulting rights of the parties might be settled in another action, which is technically sound; but the Bankrupt Court has undoubted power, and it would sometimes be its duty to see that the property was actually surrendered, at least before dividends are paid upon the proofs. A court of law, in an action arising out of the very case before Judge Hall, refused to give the surety the benefit of such a supposed release. (*Merchants' Bank v. Comstock*, 11 N. B. R., 235, 55 N. Y., 24.)

In the case in 9 Allen it was held, and very justly, that proof against both estates waived the security. The consequent equities were not considered, and no one appears to have asked for their determination. They would be that the surety's estate must surrender the security, and that the proofs against that estate must be reduced to the extent of the full value of the security.

In the present case, the proof having been made against both estates, the rule above indicated would be followed, but for the fact that there will be no dividends in the estate of John W. Foye, and therefore it is not worth while to go to the expense of reforming the proofs.

I am somewhat inclined to think the other reason given by the register for regarding the mortgage as valueless may be sound. The mortgage being for the indemnity of the surety, and the holders of the notes having no equity excepting through

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him, although it is perfectly clear that this equity does not depend on the surety's being personally damnified, or upon his having been damnified before his bankruptcy, yet I think it may be doubted whether the assignee of the principal has not a right to the security, when it is clear that no damage can possibly happen to the estate of the bankrupt surety. A doubt arises, on the other hand, from this consideration. Suppose the surety should not obtain his discharge, would he not have a right to say that the property ought to have been applied exclusively to his exoneration, and not the general debts of his principal? This might be met, perhaps, by those creditors tendering him personally an indemnity, or, as they have a largely controlling voice in both bankruptcies, by procuring his discharge. It must be admitted, too, that the American decisions seem to regard the equity as a positive one, subject only to the rights of the surety.

I place my decision, therefore, upon the ground that the creditors have proved in full, acted as general creditors of the estate of George F. Foye, the principal, and thereby have waived the security.

The assignee is to divide the proceeds of sale, pro rata, among all the creditors of George F. Foye.

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ACTS OF BANKRUPTCY.

1. Where one of the members of an insolvent firm, with knowledge of such insolvency, carries a message at the request of a creditor, although unwillingly, to an attorney directing him to enter up judgment upon a judgment note which the firm had previously given, *Held*, That he thereby procured the entry of such judgment and the issuing of the execution thereon.—*In re Benton & Bro.*, 75.
2. The taking of partnership property, when the firm is insolvent, to pay a debt not a debt of the firm, although each of the partners may be liable for it, is an act of bankruptcy.—*In re E. L. Matot & Co.*, 485.

ADJUDICATION.

1. Where the requisite number of creditors have signed the petition, an adjudication will not be set aside on the ground that such petition was procured by the bankrupts as an involuntary one to avoid the necessity of procuring the assent of the necessary number of creditors in case of a deficiency of assets; there can be no legal fraud in procuring an adjudication on involuntary proceedings unless it should be followed by a discharge that could not be had on voluntary proceedings.—*In re E. L. Matot & Co.*, 485.
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APPEAL.

1. An appeal to the Circuit Court is allowed only upon final decrees of the District Court in a suit in equity by or against an assignee where the sum in controversy exceeds five hundred dollars.—*In re Zug & Co.*, 280.

ASSETS.

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ASSIGNEE.

1. The assignee is but a trustee for the creditors; while he holds the property a creditor may bring an action to set aside a transfer by the bankrupt as fraudulent, if he makes the assignee a party; if not, the defendant must set this up as a defect of parties.—*Dewey et al. v. Moyer et al.*, 1.
2. Upon the discharge of the assignee the property remaining in his hands reverts to the debtor without reassignment.—*Ibid.*
3. A conveyance made in fraud of creditors is voidable and not void, and the property embraced in it does not absolutely vest in the assignee as a portion of the bankrupt's estate.—*Phelps et al. v. Ourts et al.*, 85.
4. Where the marshal has demanded of, and received of a sheriff property which the latter holds under an execution levy, and delivers the same to the assignee, an action for a wrongful taking and conversion cannot be maintained by the judgment creditor against the assignee.—*Ansonia Brass & Copper Co. v. Pratt, Assignee*, 170.
5. Such an action cannot be maintained in a State court as an enforcement of lien upon the funds in the hands of the assignee, acquired by virtue of the judgment. Such lien can only be enforced in the Bankrupt Court.—*Ibid.*
6. A delay of more than three months in filing the petition in bankruptcy after the execution and delivery of an assignment for the benefit of creditors, will deprive the assignee in bankruptcy of the right to the possession of the property assigned.—*In re Kimball et al.*, 188.

7. A claim in favor of the bankrupt against the Government will pass to his assignee.—*Phelps, Assignee, v. McDonald*, 217.
8. A description in the schedule of assets of a claim for the burning of cotton in the enemy's country during the war as against the officers who destroyed the same, is substantially a statement that the claim is one against the Government.—*Ibid.*
9. The bankrupt court has no jurisdiction over property of the bankrupt in foreign countries, and cannot compel an assignment thereof by him.—*Ibid.*
10. On an application by the assignee for his discharge, any misconduct on his part in respect to the estate is a proper subject for examination.—*In re Peabody*, 243.
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13. Where the former assignee of the bankrupt, a second mortgagee, was made a party defendant in a suit to foreclose the first mortgage, and died after entry of a decree *pro confesso*, but before final decree, and his successor is not made a party to the suit, a sale will not affect the second mortgage, and the assignee will be permitted to redeem.—*Avery, Assignee, v. Ryerson*, 289.
14. Assignees may sue to recover the assets of the bankrupt in the Circuit or District Court of a district other than that in which the decree in bankruptcy was entered.—*Dutcher v. Wright*, 331.
15. In Indiana a conveyance of real estate to husband and wife creates an estate in joint tenancy. While such an estate exists neither husband nor wife has any interest which can be sold on execution, or will pass to the assignee of either.—*In re Benson*, 377.
16. If the effect of a divorce, procured subsequent to an adjudication in bankruptcy, is to destroy the unity of possession and turn the estate into a tenancy in common, it is simply the creation, by operation of law, of a new interest in the bankrupt, and is, to all intents and purposes, a new acquisition which the assignee cannot claim.—*Ibid.*
17. Whether a divorce will create such a change in the nature of the estate, *quære*.—*Ibid.*
18. The bankrupt, nearly a year before the petition was filed, left for collection with his attorney a note signed by a third person, and subsequently drew several orders upon him payable out of the proceeds thereof. *Held*, That the holders of the orders were entitled to payment out of such proceeds, in preference to the assignee. *In re E. M. Smith*, 399.
19. The assignee takes the property of the bankrupt as an attaching creditor would take it, subject to all legal claims upon it.—*Stafford et al. v. Burgess, Assignee*, 402.
20. The assignee holds the assets as an officer of the court which appointed him, and his possession and management thereof cannot be interfered with by the State courts.—*Southern et al. v. Fisher*, 414.

21. Although the assignee may prosecute or defend a suit pending at the time of adjudication, he is not compelled to resort to the State court before which it was pending, but may apply directly to the Federal courts.—*Ibid.*
 22. Where there are debts due workmen which are privileged, the assignee has no right to waste their money in litigation for the supposed benefit of the general creditors.—*In re J. M. Sawyer*, 460.
 23. If the general creditors agree, the assignee should pay the privileged debts as soon as he realizes enough money for that purpose.—*Ibid.*
 24. Where the cause of action in a cause pending at the time of adjudication is one which passes to the assignee, he should be notified, and, in case of his refusal, the action must be dismissed. An order that a nonsuit be entered in case the assignee did not appear within a specified time, held to be erroneous.—*Towle v. Davenport*, 478.
 25. Where a separate adjudication is made against a bankrupt who is or has been a member of a firm, the separate creditors have a right to vote for the assignee.—*In re F. A. Falkner*, 503.
 26. Where the assignee chosen had been for several years the bookkeeper of one of the bankrupts, and said bankrupt and his attorney endeavored to control the action of the meeting in electing him, and both voted for him on powers of attorney, confirmation was refused, although the election was almost unanimous, as it appeared that a large number of individual creditors of said bankrupt were not and could not, under the law, be represented at such meeting.—*In re Wetmore & Bro.*, 514.
 27. The District Judge is bound to see that the rights of the minority are protected, and to refuse confirmation where he has good reason to suspect the assignee has been chosen in the interests of the bankrupts, or if the circumstances are such as to indicate that the election was not a fair one.—*Ibid.*
 28. The fund in the hands of the assignee may be taxed by the State.—*In re Mitchell. Ex parte Sherwin*, 535.
 29. An assignee of a corporation, appointed under the Bankrupt Laws of the United States, represents both the corporation and its creditors, and the defence of irregular organization cannot be urged against him.—*Chubb v. Upton, assignee*, 537.
- See APPEAL, 1; ASSIGNMENT FOR BENEFIT OF CREDITORS, 5; ATTACHMENT, 5; BANKS AND BANKERS, 1, 2; COMPOSITION, 7, 8; FRAUDULENT CONVEYANCE, 1; INTEREST, 1; JURISDICTION, 2, 4, 8; LIMITATION, 1; MORTGAGE, 2; PRIORITY, 4, 8; PROOF OF DEBT, 4; REGISTER, 1; SALES; TRUSTS, 1, 2, 3.

ASSIGNMENT.

See PRIORITY, 4, 5.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. An assignment for the benefit of creditors of "all the goods, chattels and effects and property of every kind, personal and mixed," does not pass the real estate to the assignee.—*Rhoads v. Blatt*, 82.
2. A voluntary assignee is a mere representative of his assignor, and takes his choses in action subject to any existing right of set-off.—*City Bank v. Sherlock*, 62.
3. Where a bank has made a voluntary assignment for the benefit of creditors, a depositor may set off a balance of deposits due him against his note held by the bank at the time of the assignment.—*Ibid.*
4. Delivery of schedules is not necessary to the validity of an assignment for the benefit of creditors.—*In re Kimball et al.*, 188.
5. Until a general assignment for the benefit of creditors has been set aside, the title to property embraced in it remains in the assignee; it does not vest in the assignee in bankruptcy by the mere force of an adjudication and his appointment as assignee.—*Belden, Assignee, v. Smith*, 302.
6. A general assignment for creditors, without giving priority, is superseded by proceedings in bankruptcy.—*Dolson et al. v. Kerr*, 405.
7. An assignment for the benefit of creditors, without preferences, made in good faith and with no fraudulent intent, is valid.—*Haas, Assignee, v. O'Brien*, 507.

See ASSIGNEE, 6; INJUNCTION, 1; PRIORITY, 6.

ATTACHMENT.

1. Under the laws of Vermont an attachment of a debt by trustee process creates a lien on the funds in the hands of the trustee after service upon him, although no notice is given to the principal debtor.—*In re Peck*, 43.
2. Such lien is a lien by attachment by mesne process and will be saved when made the prescribed length of time before the commencement of the proceedings in bankruptcy.—*Ibid.*
3. An assignment to an assignee duly appointed in the bankruptcy proceedings dissolves the lien of an attachment levied within four months prior to the filing of the petition.—*Duffield et al., Assignees, v. Horton et al.*, 59.
4. A debtor of the bankrupt who has, in ignorance of the appointment of an assignee, paid the amount of his indebtedness to the sheriff under an execution in the attachment suit, is not thereby relieved from his liability to the assignee.—*Ibid.*
5. Where an attachment is vacated by the commencement of proceedings in bankruptcy, the lien of subsequent executions is not thereby enlarged; the property passes to the assignee free from incumbrance to the extent of the attachment, and subject to the execution liens as to the excess.—*In re M. J. Nelson*, 312.

BAILMENT.

1. The bankrupt made a contract with S. & Co. to manufacture hides into leather for them, the hides to be purchased with the proceeds of drafts upon S. & Co.; the drafts were discounted at a bank, and the proceeds thereof placed to the credit of the bankrupt in his general account; the hides purchased were paid for by checks upon such account. *Held*, That the hides were purchased for S. & Co. and became their property; that it is not necessary that the agent should pay out the identical bank-notes he receives from his principal.—*Safford et al. v. Burgess, Assignee*, 402.
2. Where some of the hides were purchased with the proceeds of drafts which S. & Co. refused to accept, their title to such hides is not affected by such fact, but they become debtors to the estate or to the bank advancing the money.—*Ibid*.
3. The title to the leather, when completed, passes under the arrangement for the purchase of the hides.—*Ibid*.

BANKRUPT.

1. A bankrupt who has received his final discharge is entitled to his future acquisitions, and may use them to purchase his former assets on a sale thereof by the assignee.—*Phelps, Assignee, v. McDonald*, 217.
 2. Until an assignee is appointed, the bankrupt is the trustee of his estate for the benefit of his creditors.—*Ex parte Tremont National Bank. In re Battey*, 397.
 3. If he is indorser upon notes or bills which mature before the appointment of an assignee, he may waive demand and notice.—*Ibid*.
 4. *Seem*, that he may, even without leave of court, begin any suits which are necessary to save the statute of limitations, or are otherwise of immediate urgency, although he cannot, without suit, receive payment.—*Ibid*.
 5. A bankrupt may continue to prosecute an action pending at the time of adjudication where the cause of action is one which does not pass to the assignee.—*Towle v. Davenport*, 478.
- See ASSETS, 3; BOOKS OF ACCOUNT, 4.

BANKS AND BANKERS.

1. Where an arrangement is entered into between two banks, by which one is to act as agent of the other for clearing-house purposes, and the latter deposits funds with the former sufficient to meet checks drawn upon the latter, the relation of debtor and creditor is created, and such deposits, upon a failure of the former bank, will pass to its assignee.—*Phelan, Assignee, v. The Iron Mountain Bank*, 308.
 2. Where the latter bank has knowledge of the insolvency of the former, a repayment of such deposits by the former on the day of its failure is a preference, and may be recovered by the assignee.—*Ibid*.
- See ASSIGNMENT FOR BENEFIT OF CREDITORS, 3; PREFERENCES, 17; PROOF OF DEBT, 6; SET-OFF, 1, 5, 6, 8.

BOOKS OF ACCOUNT.

1. A merchant or trader who, prior to his becoming such, has kept books of account showing the state of his affairs, is not required to carry their contents or any part of them into his books opened and kept as a trader, in order to satisfy the requirement of the statute as to a bankrupt keeping proper books of account while he is a merchant or tradesman.—*In re Winsor*, 152.
2. Keeping proper books of account, within the meaning of the Bankrupt Act, is the keeping of an intelligent record of the merchant's or tradesman's affairs and with that reasonable degree of accuracy and care which is to be expected from an intelligent man in that business, and a casual mistake therein will not prevent a discharge.—*Ibid.*
3. It is not required that a chattel mortgage given to secure a debt shall be entered upon the merchant's or trader's books. An entry of notes upon the fly-leaf of the blotter is sufficient.—*Ibid.*
4. A bankrupt engaged in farming and trading live stock is not a tradesman within the meaning of § 5110 of the Revised Statutes.—*In re Rugsdale*, 215.

CHATTEL MORTGAGE

See BOOKS OF ACCOUNT, 8 ; PREFERENCES, 9.

CLOUD UPON TITLE

See LIENS, 9.

COMPOSITION.

1. Where notes given upon a composition settlement fall due pending action upon a petition to review the order of confirmation, and the petitioners refuse to receive payment, the money must be paid into court in order to absolve the bankrupt from liability.—*In re Alfred P. Reynolds*, 176.
2. Under such circumstances, upon a subsequent demand of payment by the creditor, and refusal by the bankrupt, the former is entitled to a summary order for payment.—*Ibid.*
3. Provable debts, although created by fraud, are discharged by a composition in bankruptcy.—*Wells v. Lamprey*, 205.
4. Where an insolvent has been legally released from his obligations by a composition with his creditors, the debt of one of such creditors, who accepted the composition on the written condition that none of the other creditors should receive better terms, is not revived by the payment by the insolvent, after such release, of additional sums to other creditors.—*In re Sturgis et al.*, 304.
5. Where, in a composition proceeding, the statement of liabilities represents a claim as being fully secured, and the creditor is in attendance, but does not participate in the proceedings nor raise any objection to such representation, the claim is not discharged by the composition, but the creditor is entitled to the percentage agreed upon in such proceeding on the

- deficit left unpaid on realizing such security, whenever ascertained.—*Paret v. Ticknor et al.*, 315.
6. Notice of an application to set aside a composition proceeding should be given to all the creditors as well as to the debtor.—*Ex parte Hamlin. In re Brodt*, 320.
 7. Where a composition, partly carried out, is set aside and an assignee appointed, the assignment to the assignee should be made without prejudice to lawful acts done or titles acquired under and by virtue of such composition.—*Ibid.*
 8. Creditors who have taken the composition should not be allowed to vote for the assignee.—*Ibid.*
 9. Where the holder of accommodation paper, knowing it to be such, enters into and signs a resolution of composition in proceedings in bankruptcy instituted against the indorsers, the maker is not thereby discharged from his liability.—*Guild v. Butler*, 347.
 10. The mere fact that the bankrupt has been refused a discharge for a cause set forth in Section 5110 is not an absolute bar to a composition.—*In re A. S. Odell et al.*, 501.
 11. The District Court is not deprived of jurisdiction to entertain proceedings for a composition by the fact that a petition to review an order refusing to discharge the bankrupt is pending in the Circuit Court.—*Ibid.*
 12. In such case the bankrupt should be required to pay the opposing creditor the expenses and disbursements, other than counsel fees, incurred in opposing the discharge, as a condition of and prior to the confirmation of the composition.—*Ibid.*
 13. A composition of five per cent. sustained where there appeared to be no assets of any value, and no probability of any dividend through an assignee, and the parties were acting in good faith.—*Ibid.*
 14. The Bankrupt Court has a right to, and will on application enjoin creditors from harrasing the debtor as long as his composition proceeding is pending.—*In re Richard H. Hinsdale*, 550.
 15. An injunction in such case can extend only to unsecured debts or debts in respect to which any security has been surrendered.—*Ibid.*
 16. The proceeding is pending until the time allowed by the resolution for making the last payment has expired.—*Ibid.*
 17. A general provision in a resolution of composition that a payment of so much money, at such time or times, to be evidenced by such and such notes, shall be accepted by the creditors in satisfaction of the debts due them, is not, as respects the creditors, an executing provision which the court is authorized to enforce. A tender of the money according to the terms of such composition is equivalent to payment, but the court cannot imprison the creditor for contempt unless he will physically take the offered money.—*Ibid.*

See SET-OFF, 4, 7.

CONTEMPT.

1. Where a bankrupt has been ordered to submit himself to further examination, a departure from the District before the time appointed, without

examination, is such a violation of the order that no discharge will be granted until it is rectified by submitting himself to such examination.—

In re Kingsley, 301.

See COMPOSITION, 17.

CONVERSION.

See ASSIGNEE, 4.

CORPORATIONS.

1. An Illinois corporation filed papers for the purpose of reorganizing, with an increased capital, in accordance with a statute of that State, which were approved by the attorney-general. Defendant subscribed for the increased capital stock and acted as an officer of the corporation. *Held*, That in an action brought by the assignee of the corporation to enforce such subscription, defendant could not deny the regularity of the organization of the new company. *Chubb v. Upton, Assignee*, 537.
2. A receiver of an insurance company, appointed under the State laws, has a standing in court to move to set aside an adjudication of the company made upon petition of a trustee in the name of the corporation.—*In re Atlantic Mutual Life Ins. Co.*, 541.
3. Upon such motion the question whether or not the corporation is insolvent cannot be examined.—*Ibid*.
4. Where, by the charter of the company, policy-holders are entitled to vote for trustees and to share in the profits, such policy-holders are corporators within the meaning of Section 122, Chapter 6, title 61 of the Revised Statutes, and have a right to be heard before an adjudication against the company can be obtained.—*Ibid*.

See STOCKHOLDERS, 1.

COSTS.

See ASSIGNEE, 11; DISTRIBUTION, 1; REGISTER, 2.

CREDITORS.

1. The Bankrupt Act does not forbid a creditor to take any contract, covenant or security from a third party as an inducement to forbear *instituting* proceedings against his debtor.—*Ecker v. Bohn*, 543.
2. But to constitute the forbearance a valid consideration for such contract, covenant, or security the creditor must, at the time of receiving it, have a right to proceed in bankruptcy against his debtor.—*Ibid*.
3. If a mortgage, pledge or lien is given by a principal debtor to secure his surety, and both become insolvent, the holders of the debts for which the surety is bound have an equity to require the property to be applied to the discharge of their debts specifically.—*Ex parte Morris. In re Foye*, 572.
4. But if the surety has been discharged by the negligence of the creditors, or if the state of the accounts between the parties is such that the surety has lost his lien, the creditors have no equity.—*Ibid*.

5. The creditors must apply their security so as to prove against either estate for the deficiency only. If the creditors prove in full, they waive their security.—*Ibid.*

See ASSIGNEE, 1, 25 ; COMPOSITION, 5, 8 ; DISCHARGE, 18 ; EXEMPT PROPERTY, 1 ; INTERVENTION, 1, 2 ; LIENS, 5.

CRIMES.

1. An indictment under Section 5132, R. S. U. S., will lie *before* an order of adjudication in bankruptcy.—*U. S. v. Myers*, 387.
2. An indictment for obtaining goods under false pretences, founded upon the ninth clause of Section 5132, need not charge an intent to defraud creditors generally.—*Ibid.*
3. Such an indictment need not contain the negative averment that the accused was in fact *not* carrying on business and dealing in the regular course of trade when he obtained credit for goods on false pretences.—*Ibid.*

DEFENSE.

See ASSIGNEE, 1 ; LIMITATION, 2.

DEPOSITS.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 3.

DISCHARGE.

1. A debtor who has been discharged in bankruptcy may waive the discharge and allow a judgment to be recovered against him for the original debt.—*Dewey et al. v. Moyer et al.*, 1.
2. Where the debtor has waived his discharge as a defense, it cannot be raised by one who is in possession of property of the debtor, transferred with intent to defraud creditors, in an action to set aside such transfer.—*Ibid.*
3. Section 5117 does not embrace the surety in a guardian's bond among those not released by a discharge in bankruptcy.—*Ex parte Taylor*, 40.
4. A discharge in bankruptcy cannot be set up as a general defence to an action by a creditor to set aside a conveyance in fraud of creditors, pending at the time of filing the petition, where such creditor has not proved his claim in the bankruptcy proceedings, and the assignee has not interfered in the cause in any way.—*Phelps et al. v. Curtis et al.*, 85.
5. But the discharge may be set up in such action in bar of a personal judgment against the bankrupt other than the subjection of the property and claims reached by the creditor's bill to the satisfaction of the judgment.—*Ibid.*
6. A cross-bill setting up defendant's discharge in bankruptcy is not defective in not making his assignee a party, where almost four years have elapsed since the appointment of the assignee, and he has made a final settlement and been discharged.—*Ibid.*

7. A discharge in bankruptcy releases the bankrupt from liability as surety on a guardian's bond.—*Reitz v. The People*, 96.
8. Where one purchases goods under a contract to pay cash on delivery, and upon delivery ships them beyond the control of the vendor, and then refuses payment, such conduct may be regarded as a fraud in the creation of the debt under Sec. 33 of the Bankrupt Act, and his discharge will not release him.—*Classen v. Schoeneman*, 98.
9. Where a new promise to pay is made after a discharge, such discharge will not preclude a recovery.—*Ibid.*
10. When A obtains goods of B, representing himself to possess property which he does not possess, and such representations induce a credit which the seller would not give without it, A has "created" a debt "by fraud," in violation of the Bankrupt Law, Section 5117, Revised Statutes U. S.—*In re Alsberg*, 116.
11. When A obtains goods, making no other special promise of payment than is involved in the ordinary assumpsit or undertaking to pay for goods purchased, but deliberately intending at the time not to pay for them, he has "created" a debt by "fraud," in violation of the provisions of the Bankrupt Law in Section 5117, Revised Statutes U. S.—*Ibid.*
12. In the absence of consent by creditors in voluntary cases, no matter when commenced nor when the debts were contracted, the assets must pay thirty per cent., or there can be no discharge.—*In re Gifford*, 135.
13. In compulsory cases, if otherwise entitled thereto, the bankrupt is entitled to a discharge irrespective of the assent of creditors or the amount of his assets.—*Ibid.*
14. A discharge obtained by fraud will be vacated. A decree annulling a discharge cannot be set aside except upon due notice to the parties to be affected thereby.—*In re Augenstein*, 252.
15. A judgment recovered pending the bankruptcy proceedings in an action begun before, and based upon a provable debt, is itself provable.—*In re Stansfield*, 268.
16. A creditor having such a judgment has an interest in the question of discharge and a right to be heard thereon.—*Ibid.*
17. Such judgment will be released by a discharge duly granted to the bankrupt judgment debtor.—*Ibid.*
18. In voluntary proceedings, creditors whose debts were contracted prior to January 1, 1869, are not to be counted in ascertaining the number and value of creditors consenting to a discharge in the absence of assets. The assent of such a creditor is a nullity.—*In re Wheeler et al.*, 277.
19. The bankrupt must apply for his discharge before the final report and discharge of the assignee.—*In re Cross*, 294.
20. To exempt a debt from the operation of a discharge on the ground of fraud, it must be tainted with fraud in its inception. If the contract was fair and honest when made, the benefit of a discharge will not be cut off by any subsequent fraudulent conduct on the part of the debtor in respect to it.—*Brown et al. v. Broach et al.*, 296.
21. Where the bankrupt bought the business of another, agreeing to pay his debts and hold him harmless, a discharge will release him, although

he has made false representations that he has paid one of such debts.—*Ibid.*

22. The better and more logical pleading is not to attempt to avoid a discharge by averments in the declaration, but to reply such matter in response to the plea.—*Ibid.*
23. In Mississippi a judgment against the sureties on an appeal bond follows upon rendition of a judgment against the principal.—*Jones et al v. Coker et al.*, 343.
24. Where sureties upon an appeal bond are discharged in bankruptcy pending such appeal, they must plead such discharge before judgment on the appeal, if they desire to avail themselves of it as a defence.—*Ibid.*
25. Payments to judgment creditors who have secured their liens by execution levies are not to be deducted from the gross amount realized by the assignee before ascertaining whether there is the requisite per cent. of assets to entitle a voluntary bankrupt to a discharge.—*In re Taggart*, 351.
26. The term assets includes all property of every kind and nature, chargeable with the debts of the bankrupt, that come into the hands of and under the control of the assignee; and the value thereof is not to be considered a less sum than that actually realized out of said property, and received by the assignee for it.—*Ibid.*
27. A discharge cannot be impeached collaterally for fraud in preventing notice to creditors of the pendency of the proceedings, nor on the ground that the bankrupt, before the proceedings in bankruptcy were commenced, fraudulently removed his property out of the jurisdiction of the court in which an action against him was pending, with intent to defraud his creditors.—*Howland v. Carson*, 372.
28. Where it is claimed that the collection of a judgment is not barred by a discharge in bankruptcy on the ground that such judgment is a debt created by fraud, the court will look back of the judgment, and if it had its root and origin in fraud, the discharge will not bar it.—*Ibid.*
29. A judgment recovered by a father for the seduction of his daughter, where there was no promise of marriage, and no arts or devices were practised to accomplish such seduction, is not a debt created by fraud within the meaning of the Bankrupt Act.—*Ibid.*

See COMPOSITION, 8, 5; CONTEMPT, 1.

DISCOVERY.

1. Where a decree operating as a lien upon defendant's estate has been obtained in a State court, and the defendant afterwards goes into bankruptcy, proceedings under State statute will not lie before a State officer against defendant for discovery of his estate similar to those given by Section 5086 of the Revised Statutes of the United States; they must be taken in the Bankruptcy Court. Where such proceedings are taken before a State officer, and the bankrupt is imprisoned by him, he will be released on *habeas corpus* by a U. S. court, where the decree of the State court is not for a fiduciary debt of the bankrupt.—*Ex parte Taylor*, 40.

See ASSETS, 3.

DISMISSAL OF PROCEEDINGS.

1. The Bankruptcy Court has full equitable powers over a proceeding in bankruptcy, and where it clearly appears to have been instituted for purposes foreign to the legitimate object of the act, it will be summarily dismissed.—*In re Hamlin, Hale & Co.*, 522.

DISTRIBUTION.

1. Attorney's commissions and costs stipulated to be paid on foreclosure are not allowable when the proceedings to foreclose are invalid.—*In re Devore*, 56.

See PRIORITY, 7.

DISTRICT COURT.

See ASSIGNEE, 5, 9, 14, 21; COMPOSITION, 11, 14; DISMISSAL OF PROCEEDINGS, 1; HOMESTEAD, 9; INJUNCTION, 3; JURISDICTION, 1, 2, 5, 9; PRACTICE, 2; SALES, 1.

DIVORCE.

See ASSIGNEE, 16, 17.

ESTOPPEL.

See LIENS, 16.

EVIDENCE.

See HABEAS CORPUS, 1.

EXECUTION.

See ATTACHMENT, 5; LIENS, 6, 10, 13, 14; PARTNERS, 1, 2; PRIORITY, 1, 2.

EXEMPT PROPERTY.

1. Creditors are not bound to except to the schedule of exempt property within twenty days after it is filed, where the assignee has failed to file it within twenty days after the assignment.—*In re Peabody*, 243.
2. Under the statute of Colorado a merchant is not entitled to an exemption of two hundred dollars' worth of goods as "stock in trade;" he is entitled to a horse as a "working animal," but not to a buggy.—*Ibid.*
3. Where there has been an adjudication in bankruptcy against a mercantile partnership, and the assets of the firm turned over to the assignee, the individual partners are not entitled to claim as exempt, under Sub. 9, Sec. 30, Ch. 34, R. S. of Wis., each the sum of two hundred dollars out of the partnership stock.—*In re Hughes & Teague*, 464.

See HOMESTEAD; REGISTER, 1.

FACTORS.

See LIENS, 12.

FALSE SWEARING.

1. If a bankrupt honestly regards a judgment held by him as worthless, he is not chargeable with false swearing or fraud if he omit it from his schedule. Even if it has value as an asset, and he considers it as having value, still its omission must be intentional in order to charge him with false swearing or fraud.—*In re Winsor*, 152.

FRAUD.

1. In a sale by an insolvent vendor, inadequacy of price is evidence of fraud, and the question of fraud on such sale should be left to the jury.—*Rhoads v. Blatt*, 32.
 2. A partner will not be allowed to put his firm, whose affairs were settled years ago, into bankruptcy, on an allegation that it is insolvent by reason of petitioner's own fraud in effecting a composition with its creditors.—*In re Hamlin, Hale & Co.*, 522.
 3. Where it appears that a petitioning partner has obtained, without consideration, assignments to his father of a large number of the pretended claims against his firm, *Held*, That this conduct, under the circumstances of the case, is a fraud on the Bankrupt Law.—*Ibid*.
- See ADJUDICATION, 2; ASSIGNEE, 11; DISCHARGE, 8, 10, 11, 20, 28, 29; FALSE SWEARING, 1; HOMESTEAD, 6.

FRAUDULENT CONVEYANCES.

1. Where one of the members of a firm, which is doing a very large but failing business on a limited capital, withdraws over one-third of his share of the capital to build upon property which he conveys to his wife, but which appears upon the firm books as an investment of the firm, until charged up to him after an assignment by such firm prior to an adjudication in involuntary bankruptcy, *Held*, That such conveyance to the wife was void, and that the assignee in bankruptcy was entitled to the proceeds of the property as against a joint creditor who has taken a mortgage thereon as security for his debt.—*Phipps et al. v. Sedgwick, Assignee*, 64.

See ASSIGNEE, 3; DISCHARGE, 4, 5.

HABEAS CORPUS.

1. The provisions of law in reference to the writ of *habeas corpus*, Sections 760 and 761, Revised Statutes U. S., when the petitioner claims the protection of a United States law against his imprisonment, are conclusive on the judge or court hearing the case, as to the admission of all legal evidence touching the right to retain in custody or discharge.—*In re Alsberg*, 116.

See DISCOVERY, 1; IMPRISONED DEBTORS, 1, 4.

HOMESTEAD.

1. Where a copartnership is insolvent, or is possessed of assets not more than adequate for the payment of debts, one member of the firm cannot, upon retiring, rightfully withdraw beyond the reach of creditors, and to their injury, a portion of the assets, and make a personal appropriation of those assets by placing them in the form of a homestead.—*In re Santhoff & Olson*, 181.
2. Under such circumstances, though it takes the form of a homestead, the property is as much within the reach of a Court of Equity as before; and no such change in its character can give it new sacredness, or endow its possessor with new privileges in its ownership or use.—*Ibid.*
3. A bachelor may be considered as the head of a family, so as to be entitled to a homestead exemption, when his widowed sister has resided with him, taking charge of his household and domestic arrangements, and paying no board, but regarding it as her home.—*Bailey v. Comings*, 382.
4. The right to such exemption is not abandoned by residence of the bankrupt for a time at another place, occasioned by ill-health.—*Ibid.*
5. Where a certain sum is allowed by statute to be invested in a homestead, such sum may be put into an undivided part interest in a homestead, and into premises to which others hold the legal title.—*Johnson, Assignee, v. May et al.*, 425.
6. An insolvent, more than four months before the commencement of proceedings in bankruptcy against him, furnished from his own property, towards building a homestead upon premises which his wife had contracted to purchase, and which were subsequently conveyed to her, the sum of fourteen hundred dollars. *Held*, That such transaction was a fraud upon his creditors, and that the assignee was entitled to a conveyance of the husband's interest in such homestead, less the amount he was authorized by law to invest in a homestead, and also to a conveyance of the balance of his interest for the benefit of creditors existing at the time of the investment.—*Ibid.*
7. A claim to a homestead exemption, under the laws of Alabama, must be asserted before a sale.—*Steele v. Moody*, 558.
8. If a bankrupt fails to claim such exemption in his schedules, he must be deemed to have waived it.—*Ibid.*
9. If the bankrupt has, from inadvertence, misdescribed in his schedules the land claimed by him as exempt, the Bankrupt Court alone has power to correct such error. A State court cannot receive mere parol evidence to cure such mistake.—*Ibid.*

IMPRISONED DEBTORS.

1. Where a bankrupt is in prison or under arrest for a debt which is not dischargeable in bankruptcy, the United States Court, on a writ of *habeas corpus*, will not discharge him.—*In re Alsberg*, 116.
2. "Order 27 in Bankruptcy," prescribed by the Supreme Court of the United States for the regulation and government of the courts in bankruptcy

matters, as regards the arrest of the bankrupt, and petition for release, must be construed as not applying to cases where the debt is dischargeable.—*Ibid.*

3. The question to be determined is one of fact, viz. : was the debt for which the bankrupt was arrested dischargeable under the Bankrupt Law, or not?—*Ibid.*
4. This question must be determined by the court or judge hearing the *habeas corpus* case, on all the legal evidence within its or his reach.—*Ibid.*
5. No *ex parte* affidavits made in the State courts as to character of the debt contracted, and no evidence of want of authority in the State courts to arrest for the frauds contemplated by Section 5117 of the Revised Statutes, will be permitted to interfere with the full examination from all sources of evidence of the simple fact, whether the debt was or was not dischargeable under the Bankrupt Act.—*Ibid.*
6. If the debt for which the prisoner is arrested is of such a character, it matters not that the State laws do not give authority to arrest for the frauds mentioned in said Section 5117, Revised Statutes.—*Ibid.*
7. It is the character of the debt as affected by the frauds mentioned in the said section which is the subject of investigation, and not the grounds of arrest which the creditor may or may not have under the State laws.—*Ibid.*
8. If the debt is dischargeable in point of fact, on the evidence before the court, no declaration to the contrary in any State proceedings will be considered.—*Ibid.*
9. An adjudication of a bankrupt, who was under arrest in a civil action at the time the proceedings were commenced, does not entitle him to a release from such arrest.—*Brandon National Bank v. Hatch*, 468.

See HABEAS CORPUS.

INJUNCTION.

1. Upon the institution of proceedings in bankruptcy an assignee for the benefit of creditors may be enjoined from interfering with the debtor's assets before an adjudication has been had.—*In re Jacob Skoll*, 175.
2. Where an assignee sold property encumbered by a chattel mortgage, without an order of court, and the mortgagee brought trover against the purchaser in a State court, in a county where the parties and their witnesses resided, *Held*, that even if the District Court had jurisdiction to restrain the prosecution of the suit, it ought not to do so under the circumstances of the case.—*In re Cooper*, 178.
3. The Bankrupt Court has no jurisdiction to relieve against a judgment obtained against a bankrupt in a suit brought against him after his adjudication, in which for any cause he has failed to plead his discharge.—*In re Ferguson*, 530.
4. Even if the court had such jurisdiction, it would not interfere to relieve the bankrupt against the *laches* of his counsel and himself.—*Ibid.*

See COMPOSITION, 14, 15.

INTEREST.

1. Where the assignee has sold real estate discharged of liens, he should allow interest on the liens to the date of making up his report of distribution.—*In re Devore*, 56.

INTERVENTION.

1. Any creditor whose interests are directly affected by the proceedings, may intervene and contest the allegations of the petition with regard to acts of bankruptcy, notwithstanding the debtor fails to appear on the return day.—*In re Jonas*, 452.
2. A general unsecured creditor is entitled to intervene and contest a petition in involuntary proceedings.—*In re Austin, Tomlinson & Webster*, 518.

INVOLUNTARY BANKRUPTCY.

See ADJUDICATION, 1; DISCHARGE, 18; PARTNERS, 4, 8; PETITION, 1, 2.

JOINT TENANT.

See ASSIGNEE, 15.

JUDGMENTS.

1. In ascertaining the validity of the docket entry of a judgment the whole entry is to be looked at, and if from the whole the amount and date of the judgment, the parties and the court in which it was rendered appear, the entry is sufficient.—*In re Hamilton Boyd*, 204.
2. While a judgment record cannot be resorted to in order to supply omissions in the docket entry, it may be examined to test the validity of such entry.—*Ibid.*

See DISCHARGE, 15, 17, 23, 29; INJUNCTION, 3; LIENS, 1, 2, 4, 9, 14; PROOF OF DEBT, 7; WIFE OF BANKRUPT, 1.

JURISDICTION.

1. When the Bankrupt Court has first taken jurisdiction by ordering a sale of mortgaged premises discharged of liens, it thereby ousts a State court of jurisdiction to foreclose the mortgage.—*In re Devore*, 56.
2. Under the amending act of June 22, 1874, the Federal courts have exclusive jurisdiction over actions brought by assignees to recover property claimed to have been transferred by a bankrupt in violation of Sec. 5128, where the value of such property exceeds five hundred dollars.—*Olcott v. Maclean et al.*, 79.
3. By the Act of June 22, 1874, the State courts were ousted of their jurisdiction over such actions pending before them at the time of its passage.—*Ibid.*

4. State courts have jurisdiction of actions brought by an assignee in bankruptcy to set aside mortgages alleged to have been made in fraud of the Bankrupt Act.—*Isett v. Stuart*, 191.
 5. Personal service made upon one of the members of an insolvent firm out of the jurisdiction of the District Court, in which the petition is filed, is not sufficient to give the court jurisdiction to adjudicate as against the party so served.—*Ibid*.
 6. The jurisdiction of the Bankrupt Court may be impeached in collateral actions.—*Ibid*.
 7. As to the bankrupt and his wife, the bankruptcy proceedings do not divest the State court of jurisdiction of an action to foreclose a mortgage given by them.—*McHenry v. La Société Française*, 385.
 8. A State court has no jurisdiction of an action brought against a trustee (or assignee) in bankruptcy to enjoin the collection of the assets of the bankrupt.—*Southern et al v. Fisher*, 414.
 9. Where the Bankrupt Court has adjudged a claim to be a lien upon property of the bankrupt, it has jurisdiction of an action to enforce such lien against third parties who have purchased said property subject to the lien at a sale by the assignee.—*Bucknam v. Dunn et al*, 470.
- See ASSIGNEE, 5, 9, 14; COMPOSITION, 11; DISCOVERY, 1; DISMISSAL OF PROCEEDINGS, 1; HOMESTEAD, 9; INJUNCTION, 3.

LACHES.

See ASSIGNEE, 6; INJUNCTION, 4.

LEASE.

See PROOF OF DEBT, 17.

LIENS.

1. In the absence of prohibitory legislation by the State, the docketing of a transcript of judgment on a holiday is not void, but will confer a valid lien upon the real estate of the debtor in the county where it is filed.—*In re Worthington*, 52.
2. The lien given by Section 266 of the Oregon civil code upon the docket of a judgment arises from the docket and not the judgment; it is a strict legal right, and must stand or fall by the statute which gives it.—*In re Boyd*, 137.
3. The docket entry is not a part of the judicial proceeding which ends with the entry of judgment, and therefore such entry cannot be referred to for the purpose of supplying omissions or explaining ambiguities in the docket; but the latter must be complete in itself.—*Ibid*.
4. A judgment which by its terms cannot be enforced against the property of a party cannot become a lien thereon.—*Ibid*.
5. A creditor having a lien upon the bankrupt's estate may decline to appear in the Bankrupt Court, in which case he will be unaffected by the proceedings unless the proper steps are taken to sell the estate clear of all incumbrances; or he may elect to prove his debt in the bankruptcy pro-

- ceedings and rely upon his security, and such action will be a waiver of his right to institute any suit or proceeding in any way inconsistent with such election.—*Spilman v. Johnson*, 145.
6. In Colorado the delivery of an execution to the sheriff constitutes such a lien upon the debtor's property as will be valid against proceedings in bankruptcy filed after such delivery, but before a levy is made.—*Bartlett, Assignee, v. Russell*, 211.
 7. In a contest between the assignee and third parties to ascertain their respective rights as to real estate, which had been purchased by the bankrupt and such parties under an agreement to furnish the outlay and share in the profit and loss equally, it is necessary to adjust the partnership dealings to the time of the commencement of the proceedings in bankruptcy and ascertain the exact interest of the bankrupt and each of his partners in such transaction.—*Thrall v. Crampton, Assignee*, 261.
 8. Where there are partnership debts still outstanding, on which the bankrupt's partner is liable, such partner is entitled to a lien upon such real estate until the debts are paid, and to indemnify him in case he is compelled to pay them.—*Ibid.*
 9. A judgment recovered after the making of a general assignment for the benefit of creditors, without preferences, and valid by the laws of the State where it is made, creates no cloud upon the title to property transferred by the assignment, although such assignment be subsequently set aside upon the application of an assignee in bankruptcy.—*Belden, Assignee, v. Smith*, 302.
 10. Subsequent executions create a lien upon all the debtor's property in the sheriff's hands not covered by a prior attachment.—*In re M. J. Nelson*, 312.
 11. Where one has a valid lien upon property in his custody belonging to another who is on the eve of bankruptcy, and sells the same with the knowledge that bankruptcy is imminent, the sale will not be afterwards disturbed by the Court in Bankruptcy, if untainted by fraud, and if there has been no sacrifice of the property.—*In re Roseberry et al.*, 340.
 12. The lien of a factor for his advancements, charges and commissions is within the meaning of the amendment to Section 5128, Revised Statutes of the United States, which provides that nothing in that section shall be construed to invalidate securities taken in good faith upon the making of a loan, and will be protected in bankruptcy.—*Ibid.*
 13. A levy which has been relinquished before the filing of a petition in bankruptcy creates no lien upon the property as against the assignee.—*Sage, Jr. v. Wynkoop, Assignee*, 363.
 14. Where, after a general assignment for creditors has been made, a judgment is recovered in the ordinary course of practice and without collusion between the debtor and creditor for the purpose of giving priority, such judgment and the levy under it are good, even as against an assignee in bankruptcy subsequently appointed.—*Dolson et al. v. Kerr*, 405.
 15. Where a suit against the bankrupt to enforce a lien is pending at the time of adjudication, the lien creditor may, before any final disposition of such suit, prove his demand in the Bankrupt Court, and have it allowed as a

lien claim, with all the rights and privileges belonging to it under the bankrupt law.—*Bucknam v. Dunn et al.*, 470.

16. Where property has, by order of the Bankrupt Court, been sold subject to a lien, the assignee's deed providing that such lien is to remain in full force, the purchaser is estopped to deny the validity of such lien.—*Ibid.*
- See ASSIGNEE, 5; ATTACHMENT, 1, 2, 5; CREDITORS, 3, 4; INTEREST, 1; JURISDICTION, 9; PRIORITY, 9.

LIMITATION.

1. A suit by an assignee to recover debts due the estate is barred by the limitation contained in Section 5057, where the summons was not issued within two years from the time when the cause of action accrued, although the petition in such suit was filed within such time.—*Walker, Assignee, v. Towner*, 285.
2. When the sale by the assignee took place more than two years after the assignment to him, the limitation of suits by and against assignees prescribed by the Bankrupt Act cannot be set up as a defence to a collateral action brought against the bankrupt by one claiming title under a sale by the assignee. The bankrupt should avail himself of it on application to vacate the sale.—*Steele v. Moody*, 558.

MORTGAGE

1. One who holds a mortgage valid as against the provisions of the Bankrupt Law, with condition broken before the commencement of the proceedings, has a right as against the assignee to all the bark-wood and timber cut from the premises, whether on them or not.—*In re William Bruce*, 318.
 2. Where such mortgagee has given notice of his claim to the marshal when he seized the property, and to the assignee when he took possession of it, and they afterwards keep possession, they are to be considered as taking it for him, and the expense of securing it should be borne by him.—*Ibid.*
 3. A creditor of the bankrupt, whose claim is secured by mortgage, may, after having proved his claim in the bankruptcy proceeding, and upon leave of the Bankrupt Court, foreclose his mortgage in a State court, if the assignee does not object.—*McHenry v. La Société Française*, 385.
- See ASSIGNEE, 12, 13; CREDITOR, 3; JURISDICTION, 1, 4, 7; PREFERENCES, 10, 11.

NEGOTIABLE PAPER.

See BANKRUPT, 8; BOOKS OF ACCOUNT, 3; COMPOSITION, 9; PROOF OF DEBT, 8, 10, 12

NOTICE.

See COMPOSITION, 6; DISCHARGE, 14.

PARTNERS.

1. The sale on execution of either or both the partners' interest in the joint assets gives to the purchaser only an interest in such assets which may

remain after the payment of the partnership debts.—*Osborn v. McBride*, 22.

2. The fact that the interests of both partners were sold on separate executions to the same purchaser can have no effect to enlarge the interest of either partner acquired by such purchaser on the separate sale of such interest, nor to discharge the assets from liability for the partnership debts.—*Ibid.*
 3. Premises used by partners for the purpose of carrying on their business *prima facie* form part of the partnership property; but this presumption may be rebutted.—*Ibid.*
 4. The fact that persons have been adjudicated bankrupts as members of one firm is no bar to, nor does it defeat a petitioner against them as partners with others in another firm.—*In re Jewett & Co.*, 48.
 5. As to whether the individual property of such persons should go to pay the debts of the former or of the latter firm, *quære*.—*Ibid.*
 6. If on dissolution of a copartnership, the retiring partner takes out a portion of the assets of the firm for his individual use, he must do so without impairing the fund to which the creditors have the right in equity to look for payment; and it must be made clearly to appear that such remaining fund is ample.—*In re Santhoff & Olson*, 181.
 7. Where real estate has been held by partners as tenants in common, the classification thereof as partnership assets, in the schedule filed by them, will not change the nature of the title to the prejudice of the rights of separate creditors.—*In re Zug & Co.*, 280.
 8. Where the requisite number of creditors join in a petition against a firm, it is not necessary that they should all be creditors of the firm.—*In re E. L. Matot & Co.*, 485.
- See ACTS OF BANKRUPTCY, 2; FRAUD, 2; HOMESTEAD, 1; LIENS, 7, 8; PRIORITY, 3; PROOF OF DEBT, 5, 16, 17.

PAYMENT.

See ATTACHMENT, 4; COMPOSITION, 17.

PETITION.

1. Petition in bankruptcy held defective in not setting out the special authority of the president of a bank, who is one of the petitioning creditors, to sign and verify the same on behalf of the bank, his general authority as an officer not being sufficient.—*In re Roche et al. v. Fox*, 461.
2. The petition alleges that the creditors joining in the petition constitute one-fourth in number of all the creditors whose provable debts amount to two hundred and fifty dollars. In setting out the names and amounts of each, however, it appears that the debts of several of them are less than that sum. *Held*, on a motion to dismiss the petition, that the same is insufficient and demurrable in this respect, but that the court has jurisdiction to allow an amendment to remedy the defect.—*Ibid.*

POLICY-HOLDERS.

See CORPORATIONS, 4.

PRACTICE.

1. An *ex parte* order approving the schedule of property set aside to the bankrupt, or confirming a report of sale of assets, made on the day such schedule or report is filed, is irregular, and therefore not binding upon the creditors.—*In re Peabody*, 243.
 2. The Bankrupt Court has power to set aside such orders at any time during pendency of the proceedings, where an aggrieved party moves therefor within a reasonable time after notice.—*Ibid.*
- See ADJUDICATION, 1; ASSIGNEE, 12; COMPOSITION, 1, 2; DISCHARGE, 14; FRAUD, 1.

PREFERENCES.

1. The exchange of a mortgage for notes, in pursuance of a parol contract that such mortgage should be given when the creditor asked for it, is not a preference under the provisions of the Bankrupt Act, although made within four months before the commencement of bankruptcy proceedings.—*Hewitt et al., Assignees, v. Northup et al.*, 27.
2. In order to render void a conveyance made by a bankrupt within four months of filing a petition with a view to give a preference, or other conveyance, within six months, it must appear that the person taking it *knew* that it was made in fraud of the provisions of the Bankrupt Act in the one case, or to prevent the property coming to the assignee, or from being distributed under the act, in the other.—*Campbell, Assignee, v. Waite et al.*, 93.
3. A conveyance made to secure an actual loan is valid if made and taken in good faith.—*Ibid.*
4. Neither bad faith nor its equivalent, conduct wanting in good faith, is to be assumed, but must be proved.—*Ibid.*
5. Where the bankrupt at the time of giving a mortgage, in pursuance of a previous agreement, to secure a pre-existing debt, requests the creditor to permit him to secure other creditors in such instrument, such request is notice of the existence of such creditors and of the bankrupt's inability to pay them.—*Lloyd, Assignee, v. Strobridge*, 197.
6. A creditor who has obtained a preference is chargeable with knowledge of facts, the existence of which he could have ascertained by the slightest effort.—*Ibid.*
7. It is not necessary that the creditor should know that the law prohibits him from taking the preference; it is enough if he knows such facts and circumstances as bring it within the prohibition of the law and make it a fraud in legal contemplation.—*Ibid.*
8. An oral promise, made at the time the debt is contracted, to give security if required, cannot be executed after the debtor has become insolvent.—*Ibid.*

9. Where a creditor accepts and records a chattel mortgage, correctly describing the note secured, in place of a prior unrecorded mortgage incorrectly describing such note, such transaction does not constitute an illegal preference, but is a simple exchange of securities.—*Player, Assignee, v. Lippincott*, 208.
10. Where the mortgage sought to be set aside was executed within the time specified in the Bankrupt Act, with a view to give a preference, the fact of repeated promises to pay, which were not kept, together with knowledge on the part of the creditor of a large amount of debts due by the bankrupt at or prior to that time which he was unable to pay, *Held*, To be reasonable cause for the creditor to believe that the insolvency which in fact existed did exist.—*In re Armstrong*, 275.
11. Where the creditor taking such mortgage knew of other unsecured debts which his debtor could not pay, and that a large part of the property was common to all from which to get their pay, *Held*, That he knew that the mortgage was made in fraud of the provisions of the Bankrupt Law.—*Ibid*.
12. A creditor may be said to have had reasonable cause to believe that his debtor was insolvent, where the fact of insolvency actually existed, when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor as would lead a prudent man to the conclusion that the debtor is unable to meet his obligations as they mature in the ordinary course of his business.—*Dutcher v. Wright*, 331.
13. In calculating the time a preference must stand in order to be valid, the day the petition was filed must be excluded.—*Ibid*.
14. An insolvent debtor, who was a trader, gave to a creditor new notes, payable on demand, signed by himself alone, to take up others of the same amount, secured by the signature and indorsement of other responsible parties, and purchased goods of persons who were ignorant of his insolvency, in order that such goods might be taken on execution on judgments recovered on such notes. *Held*, That he thereby procured, or at least suffered his property to be seized on execution within the meaning of Section 5128 of the Revised Statutes.—*Sage, Jr. v. Wynkoop, Assignee*, 363.
15. Where the agent of the creditor had reasonable cause at the time to believe the debtor was insolvent, and knew that the transaction was in fraud of the Bankrupt Law, it is the same as if the creditor had himself taken part therein, with the same cause to believe and the same knowledge.—*Ibid*.
16. When the condition of a debtor's affairs is known to be such that prudent business men would conclude that he cannot meet his obligations as they mature in the usual course of business, there is reasonable cause to believe him insolvent.—*The Merchants' National Bank v. Cook et al.*, 392.
17. Where a private banker obtains an advance from a bank on his check on New York, and on the following day delivers securities to the bank, stating at the time that he has reason to fear his check will not be met, *Held*, That the securities were transferred with intent to give a preference, and that the bank had reasonable cause to believe him insolvent.—*Ibid*.

18. The taking of a bill of sale of logs purchased with money furnished by the creditor is not a preference unless it appears that such bill of sale included more than the creditor was entitled to.—*In re* The Bousfield & Poole Mfg. Co., 489.
19. Where M., in pursuance of a scheme to obtain a preference for H., a creditor of the bankrupt, purchased logs of the bankrupt and subsequently took a transfer of a note held by H., *Held*, That he held such note as trustee for H., and that the acceptance of the logs was a preference.—*In re* Stein, 569.

See BANKS AND BANKERS, 2; PROOF OF DEBT, 13, 14, 15, 18; SET-OFF, 3.

PRIORITY.

1. Where an attachment upon property of the bankrupt for its full value is dissolved by an adjudication, a judgment creditor who has made a levy subject to such attachment is not entitled to priority as against the assignee.—*In re* Steele *et al.*, 105.
2. But where a creditor has obtained a valid and effectual lien by attachment, and has prosecuted his suit to judgment, and made an execution levy, his lien under such levy is to be considered as prior in time to that of other creditors who have levied attachments in the meantime, and is not affected by the dissolution of the attachments.—*Ibid.*
3. Where a partnership, of two partners in equal interest, were bound as a firm as surety for a debt, and a decree was rendered against the firm for the debt, to be paid, and which was paid, out of the social assets, the firm having been dissolved, and a balance having been left due, but not ascertained by judicial judgment or decree, from one of the partners to the other, and the partner who owed the balance having, after all this, gone into bankruptcy, *Held*, That the solvent partner had no right to be subrogated to the rights of the creditor of the firm, who obtained the decree for half the amount paid, against the individual estate of the bankrupt partner, as against other creditors of that partner.—*In re* G. W. Smith, 113.
4. In North Carolina a bond for title given on an executory contract for the purchase of lands conveys an equitable estate in the land to the vendee which is assignable. An assignment of such estate to indemnify sureties, made without intent to delay or defraud creditors, is valid, and the assignee is entitled to priority over judgment creditors of the assignor.—*In re* Wm. P. Reynolds, 158.
5. Such assignment is valid although no money is paid, the debt upon which the sureties are liable furnishes a sufficient consideration to support it. It need not be registered to be available against creditors, unless the time limited by statute for the registration of the bond has expired.—*Ibid.*
6. Where an insolvent who has made a general assignment for the benefit of creditors is afterwards adjudged a bankrupt, the assignee under the assignment is entitled to his disbursements legitimately made in the execution of his trust, but is not entitled to priority as to his compensation as such assignee, nor as to attorney's fees, incurred in connection with the as-

signment—as to such items he stands in the same position as other creditors and must prove his claim.—*In re Geo. Lains*, 168.

7. Where property taken by the assignee is charged with a lien, the reasonable cost of keeping and disposing of it, including the assignee's fees, should be charged upon it. No charge can be allowed for the services of an auctioneer unless it be shown that such services were necessary; nor can such fund be charged with attorney's fees for services rendered to the assignee in his contest with the lienor respecting such property.—*In re Peabody*, 243.
8. Where one party agrees to furnish goods to another at a fixed price, the latter to pay all freight, storage and charges, and to pay at the end of every three months for the goods sold by him within that time, and to pay at the end of the year for all goods remaining unsold, the proceeds of the goods sold by the latter cannot be recovered from his assignee in bankruptcy.—*In re Linforth, Kellogg & Co.*, 435.
9. Such arrangement does not create the relation of principal and agent or factor, but that of buyer and seller.—*Ibid.*
10. A mere promise to pay out of a particular fund, when received, the promiser retaining control of such fund, and no notice being given to the person who is to pay, creates no lien or charge upon such fund.—*Ex parte Tremont Nail Co. In re Middleboro Shovel Co.*, 448.

See ASSIGNEE, 18.

PRIVILEGED DEBTS.

See ASSIGNEE, 22, 23.

PROOF OF DEBT.

1. The proof of debt against an estate in bankruptcy is a proceeding *in rem* and not a proceeding against a bankrupt, nor against his executors or administrators in case of his death.—*In re Merrill*, 35.
2. Proof of debt can only be taken in a foreign country before one of the officers authorized by Section 5079 of the Revised Statutes to do so.—*In re Lynch et al.*, 38.
3. No debt can be proved on which an action could not be maintained against the bankrupt in the State where the petition is filed, in case bankruptcy proceedings were not instituted.—*In re Doty*, 202.
4. A joint creditor, in case of the separate bankruptcy of one member of the firm, has a right to prove his joint debt, and vote for assignee in the separate bankruptcy.—*In re Webb*, 258.
5. Where all the members of one firm are partners in another firm, they cannot prove its debt against the latter.—*In re Savage et al.*, 368.
6. Where a bank has discounted drafts drawn by the former firm upon one who is a partner with the members of such firm in the latter firm, it cannot prove its claim thereon against the joint estate, but must look to the separate estate of the drawee.—*Ibid.*
7. A judgment against the bankrupt, existing at the time his petition is filed,

- whether founded upon contract or tort, is a provable debt.—*Howland v Carson*, 372.
8. The holder of a note or bill may prove it in full against the party primarily liable upon it, notwithstanding he may have received a part or all of it from a surety or *quasi* surety.—*Ex parte Harris et al. In re Cochrane, Jr.*, 432.
 9. C., a manufacturer, consigned goods to his factors, who advanced their notes to an amount much beyond what was ultimately realized on the goods. Both parties failed, and the factors, employing the goods then in their possession, made a composition of forty per cent. with their creditors, including the holders of the notes who reserved the right to prove in full against all other parties to them. *Held*, That these creditors, proving against C., need not give credit for the full amount received by them on the composition, but must abate their proof by giving credit for the property of C. so employed by the factors.—*Ibid*.
 10. Where notes were exchanged, and the holder has received a payment from the maker, he can only prove for the balance against the indorser.—*Ibid*.
 11. Debts are to be considered proved when they are duly authenticated and sent to the assignee or register.—*Ibid*.
 12. Where a firm, which has indorsed a note of one of the partners, becomes bankrupt before the maturity of such note, protest and notice to the firm of its dishonor is not necessary in order to prove it against the joint assets.—*Ex parte Russell. In re Paul & Son*, 476.
 13. An intent to gain a preference, accompanied by acts to accomplish it, but which entirely fail, so that no preference is received, does not come within the provisions of the Bankrupt Act, which impose penalties upon creditors who knowingly *receive* a preference.—*In re The Bousfield & Poole Mfg. Co.*, 489.
 14. All transactions to prefer a *bona fide* creditor come within the four months' clause of Section 5128; the six months' clause applies to other creditors.—*Ibid*.
 15. An effort to secure an honest debt from a failing creditor is not an actual fraud within the meaning of Section 5021.—*Ibid*.
 16. A former partner or a joint covenantor with the bankrupt, who is liable for joint debts and pays them, may prove the amount against the assets of his former partners or co-contractors.—*Ex parte Lake et al. In re Whiting et al.*, 497.
 17. A claim by retired partners for unliquidated damages, by reason of their liability under the provision of a lease to the firm, that in case of failure to perform the lessors may re-enter and relet the premises at the risk of the lessees, who should remain liable for the rent, and be credited with the sums actually realized, cannot be proved against the estate of their former partners.—*Ibid*.
 18. A creditor who has received a preference contrary to the provisions of Section 5084 of the Revised Statutes cannot prove his debt after the preference has been recovered from him by the assignee.—*In re Stein*, 569.
- See CREDITORS, 5; DISCHARGE, 15.

REAL ESTATE

1. As to questions touching the tenure of real estate, the Federal courts are to be governed by the laws and decisions of local tribunals of the country where such real estate is situated.—*In re Zug & Co.*, 280.

RECEIVERS.

See CORPORATIONS, 2.

RECORDS.

1. Bankruptcy proceedings are matters of record, but are not required to be recorded at large; they are filed and numbered, and a short memorandum kept in books provided for that purpose in the office of the clerk. Copies of such records, duly certified by the clerk, under seal of the court, are in all cases and in all courts of the country *prima facie* evidence of the facts stated therein.—*Turnbull, Jr. v. Payson, Assignee*, 440.

REDEMPTION.

See ASSIGNEE, 13.

REGISTER.

1. A register has no authority to set off exempt property to the bankrupt, nor to direct the assignee in the matter.—*In re Peabody*, 243.
2. It is the duty of registers to examine and regulate the charges, whether any creditor objects or not.—*In re J. M. Sawyer*, 460.

RES JUDICATA.

1. A prior adjudication is always available against the defeated party, when made in a competent jurisdiction, and upon a controversy actually decided in that adjudication.—*In re Leland et al.*, 505.
2. Where, in a proceeding to distribute a particular fund, the court adjudges that securities held by certain creditors are preferential, and decrees that such creditors be debarred from participating in such distribution, such adjudication is conclusive upon the creditors specified.—*Ibid.*

See REAL ESTATE, 1.

REVIVOR.

See COMPOSITION, 4.

SALES.

1. Under the rules of practice in the district of Maine the United States District Court for that district will not confirm any sales made by an assignee, but will leave the purchaser to establish his title whenever the occasion may arise.—*In re H. O. Alden*, 39.

2. An objection that the purchaser at a sale by the assignee in bankruptcy was the attorney for the assignee and as such was incapable of purchasing, cannot be raised in a collateral action, but must be made in the Bankrupt Court.—*Spilman v. Johnson*, 145.
3. Where a claim is marked in the schedule as worthless, the validity of a sale of the assets, including such claim, is not affected by its afterwards becoming valuable.—*Phelps, Assignee, v. McDonald*, 217.
4. A sale of stock to a creditor who holds it as collateral security, for ten dollars per share when it is worth twenty-five dollars per share, will be set aside for inadequacy of price, and a resale ordered.—*In re Bousfield & Poole*, 481.
5. The validity of a sale of property by an assignee in bankruptcy cannot be questioned in a collateral proceeding in the State courts.—*Steele v. Moody*, 558.

SCHEDULE.

See FALSE SWEARING, 1; HOMESTEAD, 8, 9; PARTNERS, 7.

SECURED CREDITORS.

See CREDITORS, 5; MORTGAGE, 3.

SERVICE.

See JURISDICTION, 5.

SET-OFF.

1. Under the laws of Pennsylvania, the assignee of an insolvent bank cannot accept in payment of debts due the bank a protested draft drawn by such bank upon another bank, and sold by the payee to the debtor.—*Baschore et al. v. Rhoads et al., Assignees*, 72.
2. A court of equity will not aid a debtor to a bankrupt's estate to set-off debts bought upon a speculation of the probable dividends against the debt he owes the estate.—*Hunt v. Holmes et al.*, 101.
3. Knowledge that a merchant has suspended payment generally includes a constructive knowledge of each particular suspension.—*Ibid.*
4. A creditor who receives a composition from his bankrupt debtor with full knowledge of all facts, is not entitled afterwards to require a set-off to be enforced by a court of equity which he had opportunity to assert at the time the composition was made.—*Ibid.*
5. Upon the bankruptcy of a depositor, his deposit becomes a security for the payment of his indebtedness to the bank.—*Ex parte Howard National Bank. In re North & Co.*, 420.
6. Such deposit should be set-off against the aggregate debt to the bank, not including any notes upon which the bankrupt is surety, unless the principals are insolvent.—*Ibid.*
7. A bankrupt in a composition case in which no assignee has been appointed stands in the position of an assignee in respect to set-off.—*Ibid.*

8. *Semble*, That if the bank held mere contingent debts or liabilities, or a claim for unliquidated damages arising upon contract, it may retain the deposit until the amount of its provable debt can be ascertained, and may then use it as a set-off.—*Ibid*.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 3.

STATE COURTS.

See HOMESTEAD, 9; JURISDICTION, 1, 3, 4, 7, 8.

STOCKHOLDERS.

1. In an action brought against a party who appears upon the books of a corporation as a stockholder, to recover the amount of an assessment upon stock apparently held by him, the burden of proof is upon defendant, to show that he is not a stockholder.—*Turnbull, Jr. v. Payson, Assignee*, 440.

See ASSIGNEE, 29.

SUBROGATION.

See PRIORITY, 3.

SURETIES.

1. Where the principal on a debt is insolvent, the sureties, in respect to their liability, are regarded in equity as creditors, and may retain any funds of the principal in their hands, even against an assignee for value, without notice.—*In re Wm. P. Reynolds*, 158.

See ASSETS, 2; CREDITORS, 3, 4; DISCHARGE, 3, 7, 23, 24; PRIORITY, 4, 5.

TAXATION.

See ASSIGNEE, 28.

TENANCY IN COMMON.

See PARTNERS, 7.

TENDER.

See COMPOSITION, 17.

TITLE.

See BAILMENT, 2, 3.

TRUSTS.

1. Where the income of trust moneys is to be paid to the bankrupt during his life, to be applied to the support of himself and wife, and the education

and support of their children, the trust declaring that the principal and income should be inalienable, the bankrupt takes it as sub-trustee, and is bound to apply it to the purposes named, and, therefore, it will not, upon his bankruptcy, pass to the assignee.—*Durant, Assignee, v. The Mass. Hospital Ins. Co.*, 324.

2. The court cannot apportion such income and give the assignee an aliquot share.—*Ibid.*
3. Where a deed of trust, given to secure a debt, contains a provision that, on the failure of the trustee to act, the *cestuis que trust* may appoint a new one in his stead, the power thereby conveyed is a personal trust or confidence in the *cestuis que trust*, and will not pass to their assignees in bankruptcy.—*Clark et al. v. Wilson et al.*, 356.

VOLUNTARY BANKRUPTCY.

See DISCHARGE, 12, 18, 25.

WAIVER.

See CREDITORS, 5 ; LIENS, 5.

WIFE OF BANKRUPT.

1. A judgment in *personam* cannot be taken against the wife of a bankrupt, or her executors, for the value of real or personal property conveyed to her in fraud of creditors.—*Phipps et al. v. Sedgwick, Assignee*, 64.
See ASSETS, 4 ; FRAUDULENT CONVEYANCE, 1.

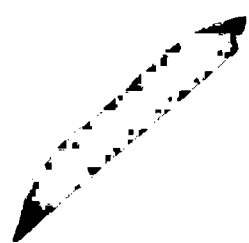
WITNESS.

1. A creditor offering himself as a witness to prove his claim cannot be excluded on the ground of interest when the bankrupt is dead.—*In re Merrill*, 35.

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